JOURNAL

OF THE

SOCIETY OF COMPARATIVE LEGISLATION.

EDITED FOR THE SOCIETY

BY

JOHN MACDONELL, Esq., C.B., LL.D.,

AND

EDWARD MANSON, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

New Series. No. 2, July, 1899.

LONDON:
JOHN MURRAY, ALBEMARLE STREET,
1899.

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PRINTED BY
HAZELL, WATSON, AND VINEY, LD.,
LONDON AND AYLESBURY.

CONTENTS OF No. 2.

PAGES

1. Council and Executive Committee of the Society . . v–vii

2. The Late Lord Herschell: In Memoriam (with portrait) 201–214
   1. By the Right Honourable Lord James of Hereford.
   2. By the Right Honourable Lord Davey.
   3. By Victor A. Williamson, Esq., C.M.G.
   4. By the Honourable Mr. Justice Brewer.
   5. By the Honourable Senator Fairbanks.

3. Foreign Usury Laws 215–236
   By W. M. Harrison, Esq.

4. Adoption in India 237–239
   By John D. Mayne, Esq.

5. Judicial Reform in Egypt 240–252
   By Sir John Scott, K.C.M.G., D.C.L.

6. Comparative Lunacy Law 253–275
   By A. Wood Renton, Esq.

7. Occupation and *Res Nullius* 276–286
   By John Macdonell, Esq., C.B., LL.D.

8. Agreement of European Powers as to Liquor Supply in Africa 287–292
   By H. R. Fox Bourne, Esq.

9. Some Notes on M. Lyon-Caen's Presidential Address to the Société de Législation Comparée . . . 293–295
   By Sir Courtenay Ilbert, K.C.S.I.

10. Modes of Legislation in the British Colonies: the Bahama Islands 296–301
    By Sir Ormond D. Malcolm, C.J.

PAGES

11. THE DEFENCE OF PRISONERS 302–308
By T. R. BRIDGWATER, ESQ.

12. *ALLEN* v. *FLOOD*: IN ROMAN LAW 309, 310
By WALTER H. GRIFFITH, ESQ.

13. SUICIDE AS A CRIME 311–319
By EDWARD MANSON, ESQ.

14. SECRET COMMISSIONS ACCORDING TO THE LAW OF GERMANY . 320–321
By ERNEST SCHUSTER, ESQ.

15. THE PROPOSED PENAL CODE FOR JAPAN 322–323
By W. F. CRAIES, ESQ.

16. NOTES 324–335

Circular Despatch by the Colonial Office 324
Need of Co-operation 324
Uniformity in the Publication of Statutes 325
Reciprocity in the Admission of Solicitors 326
A German View of Chartered Companies: Chinese Trade: The Native Factor 327
British Companies in France 327
Treatment of Prisoners in the United States 328
The Multiplication of Law Reports 329
Law and Science: Mr. Justice Holmes 329
The Jury System 330
Compensation for Unjust Conviction 331
Native Law in the Straits Settlements 332
Gambling: A "Place" in Fiji 332
Municipal Uniformity in the United States 333
The United States and the Acquisition of Foreign Territory . 334

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THE LATE LORD HERSCHELL:

In Memoriam.

[*Contributed by* THE RIGHT HON. LORD JAMES OF HEREFORD.]

I CANNOT refuse compliance with the request I have received to make some record of my colleagueship with Lord Herschell. That association is full to me of pleasant memories, undimmed by the dark shadow now cast over them; but such record must naturally be perfunctory and general in its character, for much that would be of interest is not yet ripe for presentation to the public.

Some thirty-five years ago a young barrister of the Northern Circuit, weary of waiting for success, resolved to leave the English Bar and seek his fortunes elsewhere. But this resolution was abandoned, and within little more than twenty years this unknown member of the Bar had become a Queen's Counsel, a member of the House of Commons, Solicitor-General, and Lord Chancellor of Great Britain. No ordinary man could obtain such positions, but Farrer Herschell gained them by true and unaided merit.

It was in June 1874 that he entered Parliament as member for the city of Durham. He selected his seat immediately behind the front Opposition bench, and soon became known to the Liberal leaders. During the session of 1875 Mr. Herschell spoke often and very ably on different subjects. In 1876 he made a memorable speech in support of Mr. Whitbread's motion condemning the slave circular issued by the Government of Mr. D'Israeli. In 1878 Lord Hartington brought forward a motion censuring the action of the Government in bringing Indian troops to Malta without the sanction of Parliament. It was Mr. Herschell who first noticed this unconstitutional proceeding, and called his leader's attention to it. After full consideration it was determined that Mr. Herschell's opinion was correct, and that Lord Hartington should move a vote of censure on the Government. In support of that motion Mr. Herschell made a most able and convincing speech.

During the six years prior to the General Election of 1880, the member for Durham was most assiduous in his parliamentary attendance, and always ready and willing to render very valuable assistance to those who had conduct of the Opposition. These services stood him in good stead when

Mr. Gladstone formed his government in 1880. The competition for the office of Solicitor-General was somewhat acute, but Lord Selborne and Lord Hartington expressed such strong opinions upon the merits of Mr. Herschell that the selection was promptly made in his favour.

Full well I recollect how I conveyed to him the news of his appointment; and, speaking from my experience as Law Officer in 1873 and 1874, I told him that we should find our work overwhelming, almost impossible properly to accomplish, if we did not loyally co-operate to assist each other; and I offered to do my best to effect this co-operation. He held out his hand, and the bargain was made. During five years of exceptionally heavy responsibility never once did the Solicitor-General fail that bargain to fulfil. But true as he was to me—his immediate colleague—to every member of the Government was he equally loyal.

The very nature of the Solicitor-General's services prevented the extent of his labours being fully known. In preparing the Bills to be introduced by the Government, in determining upon the principles they were to enforce and the form in which they were to be presented, his services were invaluable. In the passage of many of those Bills through the House of Commons he unostentatiously gave the greatest assistance. Over and over again Mr. Gladstone has been heard to acknowledge the value of the services the Solicitor-General rendered whilst the Irish Land Act of 1881 was passing through committee. During the Bradlaugh troubles he was found to be the safest of guides. It may be that the Corrupt Practices Act of 1883 and the Bankruptcy Act of the same session would never have found their way into the Statute Book if Sir Farrer Herschell had not been one of the occupants of the Ministerial Bench.

Like services were rendered in support of the County Franchise Bill of 1884; and yet the Solicitor-General so carefully abstained from seeking prominence in action that the public never learnt how much he had contributed to successes which appeared to be those of his colleagues.

If I had to marshall in order and worth the principal qualities of Lord Herschell's character, I should without hesitation give first place to his never-failing devotion to the discharge of his public duties. He seemed never to weary—neither physically nor mentally. During his Solicitor-Generalship he would commence his forensic labours at ten o'clock; occupied by them until four, he would then assiduously attend in the House of Commons until long after midnight: no twelve o'clock rule existed then. When the House rose he would bid a wearied colleague take some real rest, whilst he would proceed to deal with "the cases for opinion"; and so next morning he would have to recommence his labours without the enjoyment of more repose than could be found in an armchair.

It was this sense of loyal devotion to duty that caused Sir Farrer Herschell materially to aid in establishing a new position for the law officers in the House of Commons.

In former days they were but seldom seen in the House of Commons. They attended only when legal questions were discussed, or a crucial division was expected. Mr. Gladstone was apt to tell how, when passing the Succession Duty Act of 1853, he sent without avail over and over again to the Attorney-General asking him for his assistance in the House of Commons, and at last an answer, saying that he knew nothing about death duties, and that the Chancellor of the Exchequer must rely on the Solicitor-General, was received. Gradually the attendance of the law officers increased; and if reference be made to the returns of divisions in the House of Commons between 1880 and 1885, it will be found that the Solicitor-General was so seldom absent from them that the very Ministerial Whips scarcely head him on the list.

Although a law officer, the Solicitor-General was not a mere lawyer. He was an acute politician, then training to be the statesman he became. If the records of the Foreign Office could be disclosed, I think it would be found that during the latter years of Mr. Gladstone's Government of 1880 the law officers were consulted by that office more frequently than ever has occurred. Lord Granville was wont—generously enough—to explain why those numerous appeals were made to his law advisers. But he did not know the whole truth.

According to an old practice, the Foreign Office bag containing the case on which the legal opinion had to be given would first reach the Solicitor-General. Also, according to old custom, his draft opinion would be written upon a detached piece of paper. The papers would then be sent to the Attorney-General. Often have I read those Foreign Office papers and felt unable to discover any solution of the difficulties submitted to us. But on turning to the opinion of the Solicitor-General, I was certain to find correct answers to the questions put, and also some most ingenious suggestions for meeting any diplomatic difficulties that might exist. And as I read those opinions so did Lord Granville—only when they reached his eye two signatures were attached to them.

During the period of which I write the old system of granting patents existed. Every application for a patent—very many thousands during the year—had to be perused and adjudicated upon by the law officers. This heavy duty was supposed to be equally divided between them; but I was always under the impression that the more important applications were apt to find their way into the hands of the Solicitor-General.

It should be recollected that all his hard labour in Parliament, in committee rooms, and in his chambers was carried on contemporaneously with the building up of the greatest of reputations as a lawyer. Herschell ranks with the foremost jurists of his time. He stands classed with Selborne, Halsbury, Mellish, Jessel, and Benjamin. I will not attempt to marshall them according to merit; but if I were to do so, Herschell would not stand last on the list.

And here my undertaking seems to be discharged. I have had to tell

of our colleagueship only. When it came to an end in 1885, once again we shook hands, parting better friends than when we met in 1880. But our friendship did not cease; nothing interfered with it; until the end it went on increasing. Full confidence he gave me—a confidence that enables me to declare that never has a public man more strenuously striven a true part to play and fully his duty to do than did Farrer Herschell.

[*Contributed by* THE RIGHT HON. LORD DAVEY.]

THE first President of this Society has passed away. Members of the Society know how much we owe to Lord Herschell. He presided over the meeting at the Imperial Institute when Sir Courtenay Ilbert read his paper calling attention to the importance of the study of Comparative Legislation, and it was determined to form the Society, and he afterwards gave it his invaluable support.

During the years 1880 to 1886 I was Lord Herschell's frequent opponent, chiefly at the bar of the House of Lords and Privy Council. I was also during the same period in constant intercourse with him in the House of Commons, and afterwards practised before him; and since 1893 I have known him as a colleague.

Lord Herschell's most conspicuous mental qualities, I think, were quickness of apprehension and clearness of vision. His arguments at the Bar reflected his mind: they were distinguished by directness, conciseness, and lucidity. He fastened at once upon the real point in the case, and never was guilty of the fault in advocacy of distracting and wasting the attention of his judges by lingering over the fringe or irrelevant details of the case. He was absolutely clear and seldom repeated himself; consequently his arguments were never longer than the necessities of the case demanded. Needless to say, I never had a more formidable opponent, nor one, I will add, whom it was a greater pleasure, or, if I may use the word, a more keen enjoyment to contend against.

The same qualities distinguished Lord Herschell as a judge. In a sense his excellence was his defect: for his rapidity of mind sometimes led him to anticipate the argument and take it out of the hands of counsel. His voice is now hushed; and not only his colleagues, but all who are interested in the administration of the law in the higher Courts of Appeal, are painfully sensible of the loss they have sustained.

His judgments in the House of Lords and Privy Council remain as a monument of his judicial ability. They will always be read and valued for the acute and subtle legal reasoning, the command of principles of law, and the broad treatment of constitutional and social questions which is to be found in them.

I have dwelt on Lord Herschell as a lawyer, but it must never be forgotten

that one of the most astonishing features of his character was his versatility of mind and many-sidedness. He occupied a position in the House of Lords which few lawyers have attained, and commanded the confidence and respect of members on both sides of the House. One of the oldest and most experienced Members of the House once told me that he never knew anybody who so quickly got hold of the House of Lords as Herschell did. His colleagues in the Cabinet speak of his wisdom in Council, and especially of his resource in surmounting or turning the corners of difficulties. He was equally at home in presiding over the Commission on Currency or on Vaccination as in presiding in court; and when his end came he was engaged on a difficult and delicate piece of diplomacy. We owe some of the most successful pieces of consolidation—*e.g.*, the Bills of Exchange Act and the Sales of Goods Act—largely to him. He was Chancellor and the working head of the University of London. But few people perhaps know that amongst his numerous public duties he found time to interest himself in charitable undertakings, particularly those which have for their object the care, training, and protection of the young.

It is impossible in these few lines to do adequate justice to Lord Herschell, or to measure fully the loss which the country has sustained by his death at an age when many more years of usefulness might reasonably have been hoped for. Enough if in what I have said I have in some measure indicated the appreciation of his character by a contemporary, a colleague, and a friend.

[*Contributed by* VICTOR A. WILLIAMSON, Esq., C.M.G.]

It was on February 20th, 1866, that I joined the Northern Circuit at Carlisle, and for the first time dined at the Bar mess. I sat next to a little man, with whom I very soon got into conversation about Eastern travel, having myself, some three years before, made the "Grand Tour" of Egypt, Sinai, and Palestine, which my neighbour had made some years earlier. He was Farrer Herschell, then of about six years' standing at the Bar; and from that night commenced a friendship the closeness of which increased every year, and only ceased on the sad day, March 22nd last, when I saw his coffin laid in the peaceful churchyard of Tinkleton in Dorsetshire.

Very nearly twenty years from that first meeting at Carlisle, on Saturday, January 30th, 1886, I was dining with him at his house in Grosvenor Gardens, when he had just received the note from Mr. Gladstone offering him the post of Lord Chancellor.

I am told by his sister, Mrs. Cunliffe, that from the age of six or seven he never varied in his resolution to follow the law as his profession, and that his brother and sisters used to tease him by asking him what title he would assume as Lord Chancellor; that when about nine years old his amusement

was to deliver lectures to his family on subjects of public interest, one being upon the then new invention of the electric telegraph, and another on the Corn Laws, the agitation for the repeal of which was then at its height.

His mother, Helen Skirving Mowbray, of Edinburgh, was a most accomplished woman, being a fine musician and a remarkable linguist, qualities which have unquestionably been transmitted to her descendants.

When Farrer was about eleven some friend presented him with a concertina, and he thereupon applied himself to mastering it with the same dogged perseverance which he displayed in greater matters in mature life, and which, in no long time, was crowned with complete success.

He received his early education at a grammar-school in the suburbs of South London, and the only anecdote I ever heard him relate of his school days was the following. The head-master was a very excellent person, but no great classic, and was in the habit of making the most terrible false quantities in his pronunciation of classical names, to the great distress of his under-master. The relations between the two would appear to have been somewhat strained, for eventually a sharp quarrel arose, and the subordinate received his dismissal in the hearing of the assembled school; but as he was leaving the room he delivered a Parthian shot at the unfortunate "head," proclaiming in a loud voice that he would "rather be tried before the Areopāgus and be banished to Pergāmus" than continue longer in his situation.[1]

In 1852, when Farrer was approaching fifteen, his family settled at Bonn for some six months, and there on December 31st Mrs. Herschell died. Her linguistic powers had already shown themselves in her son, who in a very short time had acquired sufficient familiarity with German to be able to attend lectures at the university with advantage.

In the autumn following the death of his mother he accompanied his father on his second visit to the Holy Land, concluding with a voyage up the Nile—a tour which possibly may have laid the foundation of that love of travelling which was one of his especial characteristics.

In July 1855 he matriculated at the London University, and in the following October became a student of University College, Gower Street, then, as now, the leading college in connection with the university.[2]

His career there was fairly successful, although neither in the college nor the university did he attain a very high place in his student days; but in many subjects he did very well. His name appears in the Honours List in Professor De Morgan's higher senior class in pure mathematics, and he took the prize in Professor David Masson's senior class in English literature.

[1] Herschell told me this story on the hill of the Areopagus, when we were together at Athens in the autumn of 1886.—V. A. W.

[2] I am indebted for the information respecting Lord Herschell's university life to Sir Arthur Charles and Mr. R. D. Littler, Q.C., both of whom were fellow students with him.

In 1857 he again obtained a certificate of honours in Greek and prizes in logic and political economy. He was one of the best speakers in the University Debating Society, displaying from the outset the same command of language and lucidity of style as distinguished him so remarkably in after life. In conjunction with R. D. Littler (now the eminent Parliamentary Counsel), he was the editor of a *University Review*, one of the articles in which was so good as to attract the notice of Lord Brougham, who enquired into its authorship, and on being informed that the editors were two intending law students, he sent for them and, after complimenting them on their periodical, presented each with a volume of his own works.

He was called to the Bar in the end of 1860, having been a pupil in the chambers of Mr. Chitty, the well-known pleader; and among his fellow pupils were Sir A. L. Smith (now L. J.), the late Sir J. Chitty, L.J., and Sir Arthur Charles; and later he was the pupil of Mr. Hannen (afterwards Lord Hannen). Immediately after being "called" he joined the then undivided Northern Circuit. Although absolutely without any interest or professional connection whatever, by his ability and close adherence to business he soon attracted attention, but five or six years passed without his attaining to any substantial practice; indeed, so disheartened did he become that he has told me he at one time contemplated abandoning the English Bar altogether and devoting himself to practising in the consular courts in China. It was in this dark period of his career that during one Liverpool Assize he and two other brother barristers partook together of a very indifferent dinner in their lodgings and compared notes as to the apparent hopelessness of their prospects. One was Herschell (afterwards twice Lord Chancellor), another is now the Lord Chief Justice of England, and the third is now the Speaker of the House of Commons.

It was on the elevation of Mr. Hannen to the Bench in 1868, and the "taking silk" by several of the leading juniors on the Northern Circuit that Herschell's opportunity came; and it was, I think, in the summer of 1869 that at the Liverpool Assizes, when we lodged together, he obtained eighteen heavy briefs. Most men get a chance of success sooner or later, but it is by no means every man who has the ability and the energy to avail himself of it. Herschell had both, and from that time his fortunes were secure. He attained the woolsack within three months after his forty-eighth birthday, thus being the youngest (with the exception of the late Earl Cairns,[1] who beat him by a few weeks) who ever achieved that high honour. Further, he is—as far as he could discover—the only instance of the Chancellorship being held by one born in the reign of the Sovereign whom he served in that office.

I will not further trace his public career, but will confine myself to what

[1] Charles Yorke may perhaps also be excepted. He was born December 30th, 1722, and died January 1770. But as he died before his patent was completed, he may be left out of consideration.

appear to me to have been the salient points of his character as a private friend, the sphere in which I was chiefly thrown with him.

He was the most genial and delightful of companions, with the most unbounded capacity for getting through work, no matter how heavy. In the busiest days of his practice at the Bar, whilst Law Officer during probably one of the most exciting Parliaments which has sat in the last half of the century—that of 1880-85—when reading his briefs at home, in his smoking-room, it never disturbed him to have people in the room conversing; indeed, it appeared to be rather a relief to him than otherwise, and he would lay down his papers and join in the conversation if anything caught his ear which interested him.

His memory was astonishing; he hardly ever made a note, and yet, though the most unmethodical of men, he never was at fault. In travelling he never kept an account, but when it came to a periodical settlement with his fellow travellers he would accurately remember every payment he had made two or three days before, even to the smallest sums paid to a porter or a sacristan. In truth, his wonderful memory sometimes proved a snare, and certainly was a matter of despair to his private secretaries, who would receive indignant letters asking why some previous communication had not been answered. The secretary had never seen it; but on reference to Herschell he would clearly remember the subject-matter of the missing document, which eventually would be unearthed from the recesses of the pockets of his coat, and which he had opened himself, but had omitted to pass on to his secretary to be disposed of. I am informed by his former confidential clerk that it was his regular practice, when Herschell was at the Bar, on Saturday afternoons to clear out the pockets of his court coats, and that he generally found numerous letters, sometimes of great importance, such as cheques in payment of fees, which thereupon received the attention which they deserved.

His wonderful memory most particularly struck me on the two occasions on which I was engaged with him in heavy enquiries: first, the Commission of Enquiry into the Metropolitan Board of Works, in 1888; and second, the Enquiry into the National Society for the Prevention of Cruelty to Children, in 1897. At the same time, in 1888, he was presiding over the Currency Commission—a work of unusual labour, the subject being one with which he was, when he accepted the Presidency, quite unfamiliar. I have been told by some who sat with him that on accepting the Presidency he was absolutely ignorant of the subject, but that he went down to the country supplied with a goodly collection of blue books, pamphlets, and other documents bearing thereon, and when he returned he was as well posted in all the points at issue as the best of his colleagues. Though, as I have said above, he rarely took a note, he could always lay his finger upon any point on which he desired to be informed, no matter how voluminous might be the printed minutes of the shorthand writers. This

was especially apparent in the preparation of the report on the National Society for the Prevention of Cruelty to Children, which was finally written at Deal Castle, occupying a whole day, from about 10 a.m. one day until 2 a.m. the next. Both his colleagues and the secretary had drafted portions of the report which had been submitted to him, and which in substance he adopted; but for the whole of that day he was dictating, with hardly a pause or a hesitation, and with scarcely a reference to the shorthand notes, until the fingers of the secretary were fairly exhausted and first one of us and then the other relieved him, and at last his son "Dick"—then a boy of eighteen—was pressed into the service.

His two great recreations were music and travelling. He acquired a certain proficiency in playing the violoncello, which instrument, though he never had time to practise sufficiently to become an expert, he nevertheless mastered enough to be able to take a part in an orchestra, in a performance of Mendelssohn's *Hymn of Praise*; and it was a great pleasure to him to get two or three of the pupils of the Royal College of Music to come to his house on a Friday evening, even when he was most busy, to play trios and quartettes by the most classical composers with him. I believe that he was a very good musician, though no great performer.

As a travelling companion he was perfect, and never was so happy as when on a journey, taking the very keenest interest in everything, whether in such old-world scenes as Rome, Constantinople, and Athens, or in visiting the "institutions" of such brand new places as the cities in America. I shall ever remember a day in the autumn of 1877, when I was in Switzerland with the late Dean Stanley, and we were staying at the Rigi Kaltbad, that the Herschells, at that time not long married, arrived, and together we made a pilgrimage to the chief scenes in the history of William Tell. The chapel on the edge of the lake, the Rütli, Altorf, and lastly the ruins of the castle in which Tell is said to have been born, and the waterfall hard by in which tradition avers that he was drowned in attempting to rescue a child. It was a day never to be forgotten; the intense interest shown by both Stanley and Herschell in each successive spot was simply indescribable.

As a member of society he was the most amiable and loveable of men, and a tenderer heart never beat in human breast.

Though no one could be more dignified if the occasion demanded it he never was in the least pompous; and I well remember the conversation we had together on the night he received Mr. Gladstone's offer of the woolsack, and almost the last words he uttered as I was leaving him were, "On one thing, at any rate, I am resolved, and that is, I will not become a pompous Bloke." Most certainly he never did, for no one more keenly enjoyed a joke, and he was annoyed when some few years ago he was described by some newspaper as being totally destitute of any sense of humour.

In a country house he was always the life and soul of the party, charming the old with the brilliancy of his conversation, and the young by his geniality and sympathy with their amusements. When Lord Chancellor in 1886, and staying at the Deanery of Christ Church, Oxford, he delighted the young men by going at night and smoking his cigar in the rooms of an undergraduate friend; and in the last sea voyage he ever made—from Quebec to Halifax—he equally fascinated the young officers of the flag-ship, H.M.S. *Renown*, by joining them in the ward-room, chatting with the most perfect familiarity and listening to their "yarns."

Children were devoted to him, and nowhere was he seen to greater advantage than in the intimacy of his own family. Indeed, his sympathies were not restricted to the human species, for on one occasion, while he was Lord Chancellor the last time, he sat up the greater part of the night watching a sick parrot, to which he was greatly attached, and which he believed, howbeit erroneously, to be dying.

If he was not perhaps what would be termed by some extreme persons in these days a very "good Churchman," he was unquestionably a most exemplary Christian, and a regular attendant at St. Peter's, Eaton Square, of which he was for a few years the vicar's churchwarden; but, while thoroughly appreciating and enjoying a stately choral service, he had no sympathy with the extravagances of modern Ritualism, and detested everything approaching to sacerdotal domination or to sectarian intolerance.

His generosity was unbounded, and many a charitable institution will miss in him a liberal benefactor.

The last months of his life were, I believe, sad to him. His mission to Canada and the United States was only undertaken on the assurance that he was a *persona grata* in America, and therefore more likely to carry the negotiations through to a successful issue than any other public man; but my impression is that he left England with a heavy heart. His expression to me on our last parting early in July last was that it seemed to him a "gigantic undertaking," seeing that the discussion of the points in dispute might very easily extend over five or six months, which, considering that the Venezuela Arbitration was coming on immediately afterwards, seemed to weigh upon him. I am assured by those with whom he latterly came most in contact that he was thoroughly homesick, and a tone of sadness pervades his last letters which fully corroborates this. Writing to an intimate private friend on December 27th last, he says: "I can't take any interest in anything until these horrible negotiations are at an end. The fate of the Liberal party does not excite me. My thoughts are all occupied with 'free fish' and 'free lumber' and 'free hay,' and the boundary of Alaska and the fate of the seal-herd, which are regarded here as of infinitely greater importance than the question who is to lead the Liberal party, and what he is to lead them to. When I left England I regarded 'protection' as an economic blunder. I now view it as a crime, as un-Christian—indeed, as anti-Christian." Only a day or two

before his end he told his secretary that he thought he would devote his old age to writing a book on this subject.

Startling as was the suddenness of his death, the post-mortem examination revealed the fact that he was not the strong man he was generally believed to be: in fact, he was worn out. For some years I had noticed a change which convinced me that his incessant hard work was telling even upon him. I first observed this during his last term of office as Lord Chancellor, in the winter of 1894, when he began to complain of weariness, and from that time I perceived in him an excitability, not to say at times an irritability, which was quite foreign to his old self.

It would be rash to speculate upon the question whether, had he lived without accident, he would have been able for any length of time to have continued active work; but one who is in a position to know best entertains "little doubt that he would not," and, while hesitating to express any opinion as to the time during which he would have retained his health, feels certain that there would have been a breakdown, though not necessarily of so sudden a kind.

For his own sake, therefore, all has probably been for the best. Grievous as has been the loss of him to all his private friends who loved him, and to the public whom he served so well, to him it would have been still more grievous to have found himself compelled to live the life of an invalid, and we may pronounce him *felix opportunitate mortis*.

[*Contributed by* THE HON. MR. JUSTICE BREWER.]

I MAY be permitted to add, a brief expression of my personal respect for the late Lord Herschell, and also to testify to the strong hold which he acquired upon those with whom he was thrown in contact in his recent visit to America. Of course nothing that I say can add to his high reputation; his own works and achievements have made and will perpetuate that.

He was a most genial, companionable man; frank, unaffected, full of pleasant, instructive talk, and even in the brief time he was with us drew to himself many warm friends. I saw him only a few hours before his death, and, little thinking that the end was so near, we had a delightful conversation concerning the approaching work of the British Venezuelan arbitration tribunal, in which he took the greatest interest and in whose success he expressed the greatest confidence. Contrasting his present work with it, he said, "Here we negotiate, there we are judges and decide; and we shall see that justice is done—only justice."

The admiration and confidence I had learned to feel for and in him was shared by all who here met him. Frequent was the remark both before and after his death that England was fortunate in having one so wise, tactful,

and just to represent her in the settlement of the difficult questions presented to that international commission, of which he was the honoured president.

Surely in the coming days, when men of peace are given their just recognition, Lord Herschell will be regarded as one of England's greatest men, one whose life and work were along the highest lines.

[*Contributed by* The Hon. SENATOR FAIRBANKS.]

The appointment of Lord Herschell as a member of the United States and British Joint High Commission, by Her Britannic Majesty, to aid in adjusting the several questions in dispute between the two powers, was received with favour by the Administration in Washington. He was well known to be a jurist of repute, a statesman of eminence, and withal to have a friendly and cordial feeling for the United States. Moreover, it was well understood that he entertained a sincere desire to co-operate in removing the questions which had so long vexed and divided the two countries, in order that good neighbourhood might be firmly established. His desire to see the two great English-speaking nations on terms of amity was profound and undisguised.

Lord Herschell had visited the United States some years prior to the assembling of the Commission at Quebec, and had formed the acquaintance of many of our influential statesmen, jurists, and lawyers, who entertained for him sentiments of high personal esteem. His appointment upon the Commission, from whose deliberations so much was desired and expected, gave to them particular satisfaction. He did not come as an entire stranger.

The members of the Joint High Commission were early and favourably impressed with Lord Herschell's generous and friendly purposes. He brought to the difficult work committed to the discretion of the Commission ability of a high order, the well trained intellect of a great jurist, and the faculty of mastering detail which made him a most useful member. He addressed himself to the questions before the Commission with seriousness and great vigour, and with a very just sense of the respective rights and duties of the obligations and responsibilities of the two countries. His bearing was always cordial and dignified, in full keeping with the important commission which he bore.

He was sought by commercial bodies and leading statesmen and jurists in both Canada and the United States, who desired to do him honour. He was the guest at many notable gatherings in both countries, where he left a most favourable impression. The New York Chamber of Commerce, the leading commercial organisation of the United States, tendered him a dinner where were gathered some of the most conspicuous men of commercial affairs in the country. The famous Lotus Club of the same city entertained him as its guest. There were present some of the most distinguished statesmen, orators, and writers to do him honour. Upon all occasions he impressed

those who met him, not only with his wit and learning, but with his unselfish and exalted purpose.

A notable distinction was shown him by the Supreme Court of the United States, when he was invited to a seat upon the bench—an honour similarly bestowed but once previously, and that was when Lord Chief Justice Coleridge visited the court.

I shall ever remember with great interest my last visit to Lord Herschell: it was but two evenings prior to his death. I had called, as was my wont, to break the monotony of his irksome confinement. He lay upon his cot, to all appearances in the full enjoyment of his customary health. He was in his usual good spirits and was obviously pleased with my informal call. About him in profusion were the leading British and American papers of the day—books and magazines sent him by admiring friends for his entertainment. He was in a reminiscent mood, and talked entertainingly of his experience at the English Bar; of his parliamentary service; of his membership of the Gladstone ministry; of Mr. Gladstone's characteristics, of his pre-eminent qualities, and of his absolute ability to promptly meet every exigency; of the British colonial system, and of the relations between Great Britain and the United States;—topics which gave to the evening great and charming interest. He was gratified with the kindly messages sent him by the President and leading statesmen and citizens at the Capitol upon learning of his injury, and from day to day thereafter.

I several times sought to go, fearing that he might over-tax himself, but he insisted that I should stay beyond my allotted time. I finally took leave of him against his wish, and with no thought that it was a final leave-taking.

He bore his severe injury with a stoic's fortitude; no word of complaint escaped his lips. He looked forward cheerfully to the time when his surgeons would permit his return to England. Although everything which science could suggest or kindness could do was done for his comfort, he hoped in a short month to be able to journey home, and in the fall to return and resume the uncompleted work of the Commission which he had so much at heart.

Within a comparatively few hours after my leave-taking Lord Herschell died. His untimely death profoundly touched his colleagues upon the Commission and the people of the United States; it caused uncommon sorrow throughout the nation. The press was full of praise of the virtues of the deceased, and many commercial, literary and other bodies made suitable minutes of his demise.

His death occurred during the last days of the Fifty-fifth Congress. Business of urgent moment was upon the calendar, but the United States Senate paused to receive announcement of his decease and to adopt suitable resolutions for transmission to Her Britannic Majesty. In moving the resolutions, tributes were paid by senators to his high personal attainments, his conspicuous civic services, and his marked and agreeable personality.

The President tendered a gunboat to convey his remains to his native land; but the British Government had arranged to convey them in a man-of-war, or the courtesy of the President, so gladly extended, would doubtless have been accepted.

The funeral services in the city of Washington were marked with unusual solemnity. There were in attendance the President, the Vice-President, the Cabinet, the Supreme Court, representatives of the Government of the Dominion of Canada, American members of the Joint High Commission, senators, representatives, foreign ambassadors and ministers, representatives of the Army and Navy, and distinguished private citizens of the national capitol.

The memory of Lord Herschell will long abide among our countrymen; and the members of the United States and British Joint High Commission will forever hold in grateful remembrance their able, genial, and kindly co-worker.

FOREIGN USURY LAWS.

[*Contributed by* W. M. Harrison, Esq. *Barrister-at-Law.*]

The usury laws of the civilised world, as they at present exist, are the result of two different, and to a certain extent contradictory, movements. The progress of these movements will, it is hoped, be gathered from the details which follow in reference to each country; but it may be useful at the outset to indicate very briefly the main outlines of their course.

At the beginning of the present century there was scarcely any country which allowed contracting parties to stipulate for more than a definite rate of interest. At the present day we find that, to a very considerable extent, no legal limits on the rate of interest are in existence; while, on the other hand, a new and wider conception of usury has been evolved, which has found expression in the laws of several nations. The first of these movements, which, like the second, has not yet attained to its full results, is connected chiefly with the names of Bentham and of Turgot. The influence of both writers was felt beyond the limits of their own countries: the *Defence of Usury* appeared in a German translation as early as 1788, the *Mémoire sur le Prêt à Intérèt* in 1790. By the beginning of the fourth quarter of the present century, all Europe practically, with the exception of France and Russia, had adopted the principle of freedom of contract between individuals, so far, at any rate, as was involved in the abolition of the old usury laws—that is to say, laws prescribing a maximum rate, above which parties might not stipulate for the payment of interest. South America and Australasia were for the most part permanently freed from the usury laws at an earlier date than most European countries; North America has, on the contrary, to a considerable extent remained, and for the present appears likely to remain, untouched by the movement.

Notwithstanding certain isolated instances to the contrary—one as recent as 1898—there are no indications of any general return to, or any wide demand for, laws limiting the rate of conventional interest.

But even before the advocates of commercial freedom had won their most important victories, the counter movement had started on its way. Between 1840 and 1850 several German states—Hesse-Darmstadt, Nassau, Baden, and Saxony—adopted a new principle: henceforward the usurer was to be treated as a criminal (this in itself was nothing new); but, further,

usury was to mean no longer merely, or *necessarily at all*, the exceeding a rigid maximum rate of interest, but any transaction where one party was for some reason or another—because of inexperience, for example, or some other unbusinesslike characteristic—at a disadvantage in relation to the other, and that other took advantage of his position to secure excessive profits to himself. Usury for the purpose of the modern law is, speaking widely, exploitation resulting in an unconscionable bargain. At one time this new movement seemed likely to die out—for, with the possible exception of one or two Swiss cantons, all the laws of the new type had, by 1871, under the influence of hostile criticism, disappeared from the Statute Books of Europe; but from 1877 onwards the advance of the new principle has been continuous, and its success has every appearance of permanence. At the present day Austria, Germany, Hungary, the larger number of the Swiss cantons, Norway, and Russia possess laws which, though varying in detail, are in essentials modelled on the Baden law of 1845. The Latin countries have so far stood aloof—in the case of France advisedly so; and outside Europe the new conception of usury has been nowhere adopted except in India, and there not for the purposes of the criminal law. This new legislation has had the vehement support of the greater number of theoretical writers in Germany, who expressly reject Bentham and his conclusions, and whose views may be found expressed in the words of Jhering (*Zweck im Rechte* i. 138): "Unfettered freedom in commerce is a licence to extortion, a pass for robbers and pirates to the purses of all who fall into their hands. Alas for the victim! One can understand that the wolves cry out for freedom. If the sheep join in their cry, they only prove—that they are sheep!"

Lastly, a small group of countries—all, curiously, countries of the Roman-Dutch law—has neither laws of the old nor of the new type; but in each case the court has to examine the transaction and say whether the stipulated interest is in fact excessive and usurious or not.

For the sake of convenience the foreign terminology of "conventional" and "legal" rate has been adopted throughout to denote respectively the maximum rate of interest which parties may agree upon, and the rate of interest awarded by the court in default of agreement.

All consideration of the laws relating to loans by pawnbrokers has been advisedly omitted.

A. COUNTRIES OF FREE CONTRACT.

The following countries are apparently free from all restrictions in the nature of usury laws:—

Italy.—A law of June 5th, 1857, introduced freedom in the rate of conventional interest for the kingdom of Sardinia, and the provisions of this law are re-enacted for the whole of Italy by the Italian Civil Code, which came into operation at the beginning of 1866. But it is provided (s. 1831) that in

cases of civil, as opposed to commercial, transactions, where the conventional rate exceeds the legal rate—viz., 5 per cent.—the agreement to pay such higher rate must be in writing; and, further (s. 1832), a debtor may, upon due notice, pay off sums borrowed at such excessive rate, after the loan has run for five years, although there was an agreement that the loan should continue for some longer period.

Spain.—All provisions dealing with usury offences were intentionally omitted when the Penal Code was republished in 1850; and a law of March 14th, 1856, abolished all restrictions on the rate of interest on loans. It is, however, required that the contract to pay interest shall be in writing, and interest upon interest is not allowed.

It is worthy of notice that the original draft of the law of 1856 contained a provision to the effect that, in cases where the stipulated rate of interest caused a serious prejudice to the borrower, he might either claim rescission of the contract or reduction of the interest in the current rate.

Portugal.—The Commercial Code of 1833 first allowed parties in commercial transactions to fix their own rate; and the Civil Code (published 1867) gives freedom in all contracts of loan, not even requiring the contract for payment of interest to be in writing. But here again compound interest is not allowed, unless the parties have by a fresh contract capitalised interest accrued due. Not more than five years' arrears of interest are legally recoverable.

Holland.—This country was from 1807 till 1857 under the *régime* of the French law (see *infra*), but by a law of December 12th, 1857, freedom of stipulation in the matter of interest was restored. This law was avowedly only a tentative measure, but does not appear to have been ever repealed. The rate of interest must be fixed in writing.

Switzerland.—Restrictions were abolished in most of the important cantons between 1855 and 1867—in two cases as early as 1843; and freedom still prevails, subject to the large exceptions mentioned hereafter.

British North America.—The British North America Act reserves the right to legislate on the topic of interest to the Canadian Parliament; and it is provided by c. 127, s. 1, of the Revised Statutes of Canada (1886), that "except as otherwise provided by this or by any other Act of Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon."

By a Dominion Act of 1888 these provisions are extended to Manitoba. The exceptions to this freedom, which are insignificant, are set out below.

Newfoundland.

The United States of North America.—Freedom only prevails in the following states of the Union: viz., Washington, California, Maine, Massachusetts, Rhode Island, Nevada, Colorado, Montana, Wyoming, and Florida. In all these, with the exception of Washington, a contract to pay interest

exceeding the legal rate is not valid unless put into writing; and the restrictions mentioned below on the powers of banking associations are enforced throughout the Union irrespective of State boundaries.

Brazil.—Law of October 24th, 1832.

Ecuador.—Law of October 7th, 1833.

New Granada (Colombia).—The law of May 26th, 1835, which abrogated existing usury laws, applied to seven out of the eight provinces of this Republic. For the eighth (Bolivia), see below.

Peru.—The code of 1852 removes all restrictions. This country provides a striking example of the beneficial results of freedom, the current rate of interest falling after the alteration in the law from 50 to 12 per cent.

Uruguay.—Law of April, 1838.

Mauritius.—By a decree of the Code Decaen of March 26th, 1808, the French law of September 1807 (see *infra*) was extended to this island; this decree was, however, abrogated by an ordinance of 1882, and complete liberty of stipulation restored.

Natal.—By Law 6 of 1858, entitled "An Act for securing free trade in money," it was enacted that any rate of interest might be charged. From the preamble to the Act it appears that doubts existed as to whether the common law—*i.e.*, Roman-Dutch law—fixed any conventional rate. As to this last point, see below, under the Cape of Good Hope.

New South Wales.—By Law 10 of 1835 it was declared that the usury laws of England were not to be in force in the colony.

Tasmania.—An Act of 11 Geo. IV. enacted the same for this colony.

Queensland.—Freedom was declared in this colony in the same year as in New South Wales.

New Zealand.—Law 12 of 1880 provides that the English usury laws shall be deemed never to have been in force in New Zealand.

Straits Settlement.—The usury laws were repealed in 1855.

Victoria.

Western Australia.

Trinidad.—In 1846 the usury laws were temporarily abrogated; and since 1859 the rate of interest has been permanently free, except in the case of loans not exceeding £20.

Saint Lucia.—The Civil Code of 1877 allows parties to fix freely the rate of conventional interest.

Grenada.

Bahamas.—Freedom has apparently prevailed since 1857.

British Honduras.

Gold Coast Colony.

Jamaica.—Since 1855.

B. COUNTRIES OF UNFREE CONTRACT.

I.—Where the usury laws are either laws establishing a maximum rate of interest, or laws in some way dependent on such maximum rate.

France.—France, notwithstanding the claim sometimes made on her behalf, has to yield to Austria the honour of having been the first country in Europe to grant complete liberty to contracting parties of fixing their own rate of interest on loans. It is sometimes stated that a law of October 12th, 1789, removed all restrictions then existing on the rate of conventional interest. It appears that this was not the case, but that during the Revolution the limit of 5 per cent., which continued to exist legally, was in practice habitually disregarded. But law and practice were first brought into harmony by Art. 1907 of the Civil Code (promulgated in 1804), which declares that conventional interest may exceed legal interest on all occasions when not forbidden by law, but requires parties to fix in writing the rate of such interest. The period of freedom was of brief duration, for the shameless abuse of the prevailing liberty by usurers rendered necessary the enactment of the law of September 3rd, 1807.

Law of September 3rd, 1807.—The chief provisions of this law, which are, it will be observed, both civil and penal, are as follows :—

Art. 1. Conventional interest may not exceed 5 per cent. in civil matters, 6 per cent. in commercial matters.

Art. 2. Legal interest is to be at the same rate.

Art. 3. Sums received in excess of these rates are to be restored, or are to be set off against the capital of the loan.

Art. 4. The habitual practice of usury is to entail liability to a fine not exceeding one half of the capital usuriously lent. If in addition there has been swindling (*escroquerie*), imprisonment up to two years may be inflicted.

Laws of 1850, 1857, and 1886.—The law of 1807, though still in force, has been modified by three laws of later date. The first of these is the law of December 19th, 1850. Under this law payments in excess of the conventional rate are *ipso jure* to be set off against interest and capital. The punishment for the offence of usury is made more severe, the amount of the fine being increased, and a period of imprisonment varying from six days to six months being made a necessary part of such punishment. If the offence is repeated—and any single usurious act within five years of the judgment constitutes a repetition—the maximum punishment, and even in some cases double the maximum, is to be inflicted; and on any condemnation the delinquent may be ordered to publish the judgment at his own cost in several newspapers of the Department.

By the second of these laws, passed June 19th, 1857, a special privilege was given to the Bank of France, which thenceforth was to be allowed,

"if the circumstances demand it, to raise above 6 per cent. the rate of its discount and the interest on its advances."

The privilege given to the Bank of France was by the action of the courts soon extended to all banks, which were allowed to recover, under the name of charges for commission and the like, what was really nothing else but disguised interest in excess of the conventional rate. But, on the other hand, the courts always held themselves free to reduce such commissions, if in fact excessive and of an usurious character, to a reasonable amount. In practice, the toleration of the courts in the matter was large.

The third and last law to be mentioned is that of January 12th, 1886. It consists of a single article, the effect of which is to abrogate the laws of 1807 and 1850 *so far as regards commercial transactions.*

There exists a certain amount of doubt as to what is meant by "commercial transactions" (*en matière de commerce*). The legislature has refused to lay down any definition, and the courts appear to have found it advisable to maintain a certain vagueness in the matter. It is true that s. 632 of the Commercial Code gives a list of things which the law holds to be commercial transactions, but for the purpose of construing the usury laws this is not conclusive. The question is one to be decided by the judge of fact alone. The courts of some jurisdictions have looked at the character of the parties: are both, is the borrower, or is the lender, a *commerçant*?—others, at the object on which the money lent is to be employed. A decree of the Court of Cassation of May 14th, 1886, adopts the last view, and declares that, however the facts may be disguised, the court must decide this question by considering the true object of the loan and all the circumstances of the case.

At one time it appears to have been considered that the laws of 1807 and 1850 applied only to contracts of loan, but the better and now established view is that they apply to all contracts of credit, in which in effect (however the real facts may be veiled) money produces interest at an usurious rate.

It must be noticed that even since 1886 the courts of some jurisdictions claim and exercise the right, which they exercised in relation to banking transactions before that date, of cutting down to a reasonable figure interest (whether expressly so called or not) in commercial transactions which exceeds the legal rate.

These two last laws (*sc.* those of 1857 and 1886) are, it will be observed, of a different character from the law of 1850. They modify radically not the penalties, but the scope of the law of 1807, and were the result of an agitation against that law, which found outward expression six times at least in parliamentary proposals for its modification—in 1836, 1857, 1871, 1876, 1878, and 1881. In 1864 the Government set on foot a very thorough enquiry into the matter, and the results of this enquiry are to be found in two large volumes published in 1865 (*Enquête sur la Législation Rélative au Taux de l'Intérêt de l'Argent*, Paris, 1865).

The evidence, oral and documentary, taken before this commission of enquiry is conflicting. Perhaps it may be summed up shortly by saying that all theorists and commercial persons were against the laws, which they declared useless, and at the same time pernicious; while, on the other hand, the provincial notaries, who would be in touch with the small capitalists, work-people, and land-holders, expressed strong views in favour of the existing law, which many of them stated to be executed regularly and satisfactorily *en matière civile*. But again, a committee of the Chamber of Deputies, appointed in 1879 to consider the advisability of repealing the usury laws, reported that the effect of these laws had become absolutely nil, and gave as a *démonstration éclatante* of this fact the statistics of prosecutions for usury, which showed the following figures: in 1825, 461 prosecutions; in 1854, 238 prosecutions; in 1876, 13 prosecutions. The percentage of convictions during the years 1853-1863 was high—viz., 83 per cent. (1,182 out of 1,422)—strikingly higher than the percentage of convictions under the German and Austrian laws, as might have been expected from the indeterminateness of the provisions of the latter (see *infra*). The decrease in the number of prosecutions is, of course, susceptible of another explanation—viz., that the existence of the law exercises a deterrent effect. However this may be, it appears to be the case that France is in the happy position at the present day of being one of the European countries least oppressed by usury. But usury to a certain extent there still is—to be found for the most part under the form of sales subject to a right of redemption. Under the cover of transactions of this nature dealers in the pawn-tickets of the Mont-de-Piété lend at rates reaching 120 per cent.; and the same is true of the so-called *maisons de consignation* in connection with their dealings in all kinds of movable property.

French Colonies.—The rate of interest in Algeria was left to be freely fixed by the parties till a very recent date. But upon the proposal of the Algerian deputies, four sections were introduced into the Budget Law of 1898 to deal with the serious state of things existing in that colony as a result of the prevalence of usurious transactions. The Senate twice refused to accept these sections, but as the Chamber of Deputies insisted, eventually yielded. The more important of these sections are as follows:—

S. 61. Conventional interest may not exceed 8 per cent. in either civil or commercial transactions, while legal interest is reduced to 6 per cent. in commercial and 5 per cent. in civil transactions.

S. 63. The law of December 19th, 1850, is to apply to Algeria.

Sweden.—The Swedish Civil Code of 1734 prescribed 6 per cent. as the limit for conventional interest. But in 1864 the existing law was modified to this extent, that complete freedom was granted in all cases of loans for periods not exceeding six months from the making of the same *and* not secured by hypothec. All other loans remain subject to the old law, by which to stipulate for more than 6 per cent. involves the loss

of *all* interest and a fine of one-tenth of the capital for the benefit of the poor.

The law has been entirely ineffectual in preventing usurious transactions, and a draft bill on the lines of the existing German law has been brought before the Swedish Parliament, but not yet passed into law.

Denmark.—By an ordinance of January 5th, 1813, interest was limited to 3 per cent. But a law of April 6th, 1855, introduced complete freedom, subject only to the following exception: in case of loans secured on immovable property the interest is limited to 4 or at most 6 per cent. In practice this restriction is disregarded, except where the loans are, as very frequently happens, made by some state or public agency.

Belgium.—Down to 1865 this country was subject to the French law of 1807; but a law of May 5th, 1865, allowed contracting parties to fix their own rate. It was, however, very soon found necessary to protect borrowers in some way; and s. 494 of the Penal Code (published June 8th, 1867) provides that any person who *habitually* lends money at a rate exceeding the legal rate—viz., 5 per cent. in civil, 6 per cent. in commercial transactions—at the same time taking advantage of the unbusinesslike character or the passions of the borrower, shall be liable to imprisonment for a period varying from one month to one year, either with or without a fine of from one thousand to ten thousand francs.

It should be observed that this law, like the one next to be mentioned, applies only to loans.

Switzerland.—Luzern. In this canton usury is constituted by the same circumstances as in Belgium, and in addition by the taking of compound interest.

Thurgau.—In the case of hypothecary loans the rate of interest may not exceed 5 per cent. Breach of this rule entails the same consequences as a breach of the other provisions of the usury law of this canton, for which see *infra*.

Valais.—The main provisions of the Valais usury law are given below, but it must be mentioned here that, of six sets of circumstances which constitute usury, the second is to make loans or discounts at rates exceeding the rate fixed by the Civil Code or the Federal Code of Obligations for commercial transactions.

Hungary.—From 1647 down to 1868 interest was only allowed at the rate of 6 per cent., and the punishment for infringing the law in this matter was from time to time made increasingly severe. In 1868, however, Hungary fell into line with the majority of European countries, and complete freedom of interest was proclaimed. This state of things was short-lived; many abuses, and in particular the abnormal elevation of the rate of interest, brought about the law of 1877. This law, which is still in force (so far as not repealed by the law of 1883, to be presently mentioned) provides, *inter alia*, that no interest above the rate of 8 per cent. shall be legally recoverable,

and declares that interest is to include not only payments in money, but payments in kind, and, in fact, any payments over and above the return of the capital under whatever form. The law does not apply either to instruments of exchange or to commercial transactions between persons on the commercial register.

As will be seen below, Hungary also has on its Statute Book a usury law, passed in 1883, which is in effect a curious amalgamation of a law of this old type with a law of the modern type. It bears, perhaps, more resemblance to laws of the second class than to such laws as those of Belgium and Luzern, and will be considered later on. The Russian law is, as to part of it, a hybrid of the same kind.

British North America.—The exceptions to the general rule preserved by c. 127 of 1886 (see *supra*) are as follows :—

Ontario and Quebec.—No *corporation*, except it be one of certain specified insurance companies, may take higher interest than 6 per cent. Contracts in violation of this rule are void, and in addition a penalty equal to three times the value of the money lent is imposed.

Nova Scotia—The rate of interest is limited in loans on real security to 7 per cent., in loans on personal security to 10 per cent. Any defendant who pleads the law is entitled to have excessive interest deducted. There is an exception in favour of chartered banks.

Up to May 23rd, 1873, only 6 per cent. had been allowed, and contracts contravening the law were void.

New Brunswick.—Up to 1875 the limit was 6 per cent. in case of all loans, but now this only applies to corporations and certain banks ; these are subject to a penalty equal to the amount of the loan if they stipulate for more than 6 per cent.

Prince Edward Island.—Only 6 per cent. is recoverable, unless the contract is in writing.

Bermuda.—By Law 12 of 1861 contracts whereby a higher rate of interest than 7 per cent. is reserved are declared void. It is also provided that the legal rate is to be 5 per cent., and any excess over this must be stipulated for in writing.

This Act was only a temporary measure, but it has been renewed from time to time, and is now, in virtue of Act 27 of 1895, in force till 1906.

Barbadoes.—Under an Act of 1754, 6 per cent. is the maximum rate of conventional interest.

Antigua.—By a law of June 1st, 1738, no higher rate than 6 per cent. may be taken. Contracts contravening this rule are to be void.

United States of North America.—The rate of conventional interest may not exceed 12 per cent. in Kansas, Texas, Dakota (except in four counties), New Mexico, and Arizona ; 10 per cent. in Michigan, Wisconsin, Iowa, Minnesota, Nebraska, Missouri, Arkansas, Oregon, South Carolina, the

District of Columbia, and Mississippi; 8 per cent. in Kentucky, Ohio, Indiana, Illinois, Virginia, North Carolina, Georgia, and Louisiana; 18 per cent. in Idaho; and the legal rate (for the most part 6 per cent.) in all other states—among others, New Jersey, Maryland, West Virginia, and Pennsylvania.

In Nebraska, Oregon, and Illinois any conventional rate (within the above limits) exceeding the legal rate must be stipulated for in writing.

Compound interest is not allowed in California, Dakota, and Idaho at all, nor in Wisconsin and Arizona unless the intention that it shall be payable is clearly expressed in writing; and in Louisiana arrears of interest must be capitalised by a fresh contract before they can bear interest.

The legal consequences of usury—*i.e.*, "the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest"—vary in different states: (*a*) in New Hampshire, Pennsylvania, Indiana, Michigan, Kansas, Maryland, West Virginia, Kentucky, Tennessee, and Georgia any excess of interest over the conventional rate cannot be recovered; (*b*) in New Jersey, Illinois, Wisconsin, Iowa, Nebraska, Virginia, North Carolina, Missouri, Texas, Dakota, Alabama, Mississippi, Idaho, and the District of Columbia all interest is forfeited; (*c*) in Minnesota, Arkansas, Oregon, and New York any bond, bill, note, or contract tainted with usury, and any securities for such contract are void, with this exception, that in the first three of these states *bonâ fide* purchasers of paper for value before maturity are protected; (*d*) in Oregon the entire debt, and in Idaho a certain percentage, is forfeited to the county school.

Where the usurious interest has already been paid to the creditor, the following provisions apply: (1) in Vermont, New York, Pennsylvania, Minnesota, Indiana, Virginia, Kentucky, Dakota, Tennessee, and Louisiana anything paid beyond what is legally payable may simply be recovered back; (2) in Vermont, Pennsylvania, Oregon, Indiana, Kansas, and West Virginia what has been so paid plus the contract rate of interest, and in New Jersey, Alabama, Nebraska, and Columbia, such amount, without any interest, may be set off against the principal debt; (3) in New Hampshire and Wisconsin three times the amount of the excess over the amount legally payable, and in North Carolina and New Mexico double the amount of all the interest paid may be recovered.

In some states, if the debtor does not take action in pursuance of his rights as mentioned in the last paragraph, a suit may be brought against the usurious lender by the State or by a common informer.

Banking associations are, as regards the rate of interest which they are allowed to take, subject to the Federal Law (*Revised Statutes of U.S.A.*, ss. 5197 and 5198). They may take on any loan or discount not more by way of interest than the rate allowed by the laws of the state within which they are; in states where conventional interest is free, not more than 7 per

cent. There is a proviso to the effect that the taking of a *bonâ fide* bill at not more than the current rate of exchange is not to be considered usurious. Any breach of these provisions carries with it forfeiture of the whole interest. If the usurious interest has been paid, twice such amount may be recovered back within two years of the payment. It has been decided that the penalties provided by s. 5198 are superior to and exclusive of any State penalty.

In Arkansas and Georgia all titles to property made as part of an usurious contract are void.

As regards the transactions affected by the usury laws, they apply to anything which, however the form of it may be disguised, is in effect a loan, The courts will not interfere with commissions if usual in the trade or business to which the transaction belongs, but it must appear clearly that they are not a mere device to evade the law.

In some states some one or more of certain commercial transactions—*e.g.*, insurances, respondentia, bottomry bonds, advances on bills of lading, and other mercantile instruments—are specially exempted from the operation of the usury laws. New York and New Hampshire appear to possess the most liberal dispositions in this respect.

According to Bishop (*Criminal Law*, 1892), "generally the taking of interest to any extent agreed upon is no wrong, or only a civil one; and where it is otherwise, the criminal prosecution is rarely resorted to." In some states, however (*e.g.*, Indiana), a person may be indicted for usury; in Alabama a banker who discounts a note at a higher rate than 8 per cent. is guilty of a misdemeanour, and in many states usury is an offence punishable by fine or penalty.

South and Central America.—The following countries still have, or had until recently, laws restricting the rate of conventional interest; but in all cases the law appears in practice to have been habitually disregarded.

Venezuela.—Complete liberty was introduced by a law of April 10th, 1834; but a law of 1848 reintroduced a limit of 9 per cent. for conventional interest.

Argentina.—The limit is 5 per cent. in civil, 6 per cent. in commercial matters.

Bolivia.—Under a law of October 31st, 1857, only 6 per cent. in matters of commerce, and 5 per cent in all others, is allowed on money loans.

Guatemala.—Complete liberty was introduced by a law of August 1835; but this law was repealed by a law of October 12th, 1840, and the limit of 6 per cent. restored.

Mexico.—Six per cent. is the maximum in both civil and commercial matters.

Bulgaria.—In some parts of this country conventional interest may not exceed 12 per cent. (law of 1893).

Egypt.—Before 1882 the rate of interest was always determined by the

judge in accordance with the current rate (Mixed Civil Code). From 1882 to 1892 the limit for conventional interest was 12 per cent.; by a decree of July 10th, 1892, this rate was reduced to 9 per cent.

This limitation does not apply to persons subject to Mahommedan law. As regards these persons, the Government of Egypt has this year initiated a scheme under which the fellaheen will be enabled to get loans at reasonable rates from the Bank of Egypt instead of as heretofore at usurious rates from the village money-lender.

Turkey.—Interest on loans, whether civil or commercial, is by a law of 1889 limited to 9 per cent. No person may recover an amount of interest which exceeds the amount of the original loan, and compound interest is only allowed in certain limited cases.

Usurious interest which has already been paid may be recovered under certain conditions, one of which is that the loan must still be running.

II.—The general nature of the laws of the new type has already been indicated. It is now proposed to examine in detail the legislation of Germany on this topic, and then to explain the laws of other countries of this class by reference to the German law.

Germany.—The principle of freedom was not accepted with equal readiness in all the German states, and in Prussia especially it was only after prolonged and stubborn conflicts that the abrogation of the old usury laws was carried through. Already in the first half of the century several states broke away from the principle of restriction, and the general German Code of Commerce made further breaches in the system. But the important year is 1867; from November 14th in that year complete freedom of interest prevailed throughout the North German Union, Bavaria followed in December, and one by one the South German states without delay adopted the North German law. At this time some states still preserved penal usury laws, but these necessarily disappeared in 1867 in all cases where the offence punished consisted merely in stipulating for interest in excess of the conventional rate; such penal laws as survived—necessarily laws of the new type—were tacitly repealed on the promulgation of the Penal Code for the whole of Germany in May 1871.

So much for the past. The existing usury laws in Germany are to be found in three places: the law of May 24th, 1880, the law of June 19th, 1893, and the Civil Code, which came into force at the beginning of 1897.

The law of May 24th, 1880, consists of three articles, of which the second deals only with pawnbrokers. The effect of the first article is to introduce four new sub-sections—viz., 302*a*, 302*b*, 302*c*, and 302*d*—into the Criminal Code. They provide as follows:—

S. 302*a*:

"Whosoever exploits the necessitous condition, the careless improvidence (*Leichtsinn*), or the inexperience, of another person in case of a loan or of a prolongation of credit, and thereby secures the transfer, or the promise, to himself or

a third person, of pecuniary advantages which exceed the customary rate of interest to such an extent that, under the circumstances of the case, such advantages are in striking disproportion to the consideration provided, shall be punished as a usurer with imprisonment up to six months and a fine not exceeding three thousand marks. Deprivation of civil rights may also be decreed."

S. 302*b* inflicts a doubly severe punishment upon persons who either cloak advantages of the kind mentioned above, or take them in the forms of bills, or allow debtors to pledge their honour to perform them.

S. 302*c*:

"Any person is liable to the same penalties who, with knowledge of the circumstances, acquires a claim of the kind previously mentioned, and either disposes of the same to a third person or enforces the usurious advantages."

S. 302*d*:

"Any one who practises usury habitually or as a trade shall be imprisoned for not less than three months and fined from one hundred and fifty to fifteen thousand marks. The court *must* also pronounce deprivation of civil rights."

By Art. 3 of the law, "Contracts which contravene the provisions of ss. 302*a* and 302*b* are invalid." The remainder of the article provides for the rearrangement of the rights of the parties consequent on such invalidity—*e.g.*, mutual restitution of amounts paid, etc.

The law of June 19th, 1893, consists also of three articles.

Art. 1, *inter alia*, amends ss. 302*a* and 302*d*, and adds a new sub-section, s. 302*e*.

S. 302*a* is amended so as to read, after the words "inexperience of another person," "*in connection with* a loan, or a prolongation of credit, *or any other bilateral contract intended to produce the same economic results. . . .*"

S. 302*d* applies the penalties of the old s. 302*d* to all Acts with the purview of the (new) ss. 302*a* to 302*c*.

The new sub-section, 302*e*, inflicts the same punishment upon any one who *habitually or as a trade* engages in the exploitation and conduct described in s. 302*a*, *in connection with a legal transaction of a kind other than those mentioned in s.* 302*a*.

Art. 2 makes consequential amendments in Art. 3 of the law of 1880, and adds the following provision :—

"Any person who engages by way of trade in money and credit businesses is bound every year to make up the account of every person who, in the course of the year, has entered into a transaction of this nature with him and in consequence thereof become his debtor, and within three months from the end of the year to render to him a written extract from such account, showing the growth as well as the origin of the debt."

Any person who fails to comply with this provision is liable to a fine not exceeding five hundred marks and to imprisonment, and also loses all claim to interest for the past year.

This article (2) does not apply to (i) a debt resulting from a single transaction only within the year already notified in writing to the debtor, (ii) banks and loan institutions of certain specified kinds, (iii) business transactions between traders whose firm is on the commercial register.

Apart from the new provision in Art. 2, it will be noticed that the effect of the law of 1893 is to extend the term "usury" (*Wucher*), which had previously been limited to loans (*Zinswucher*), to two fresh sets of cases—viz., (*a*) all transactions resulting in a granting of credit (*Kreditwucher*), and (*b*) usury *practised habitually or as a trade* in connection with any other legal transactions, even if ready-money transactions (*Geschäfts-* or *Sachwucher*).

The Civil Code.—Art. 47 of the Introductory Law repeals Art. 3 of the law of 1880 as amended by Art. 2 of the law of 1893. The repealed articles are in effect re-enacted by the following sections in the Civil Code :—

S. 138 declares *void* in its entirety any legal transaction in which, as a consequence of such exploitation as above described, advantages out of all proportion to the consideration are secured or promised.

SS. 817, 818, and 823 provide for the mutual restoration of what has been paid or provided on a transaction void under s. 138, and as to the conditions of such restoration, etc.

Other previously existing legal provisions are re-enacted by the following sections of the Civil Code: by ss. 247 and 248, (*a*) where higher interest than 6 per cent. is payable, a debtor, notwithstanding any contrary agreement, may pay off the debt on six months' notice; (*b*) an agreement to capitalise interest made before such interest has accrued due is void.

The alteration effected in the existing law by the Civil Code seems to be simply this, that *Sachwucher*, in order to avoid a transaction, need no longer be habitual, though for the purposes of the criminal law it still must be so.

Except in the case of the new provision introduced by Art. 2 of the law of 1893, the usury laws affect commercial no less than civil transactions, in this respect differing from the Austrian and Hungarian laws and the French law since 1886.

Alsace-Lorraine.—Down to 1880 these provinces were subject to the French law of 1807, but the penal provisions of that law were abrogated by the German law of 1880. Since the Civil Code came into force the law in Alsace-Lorraine dealing with usury and rate of interest is the same as that in the rest of Germany.

The working of the German law.—A few words as to the practical working of the law may not be without interest. It is admitted by writers on the subject that, since the enactment of the law of 1880, usury in connection with loans and credit transactions has appreciably diminished in almost all districts: in Westphalia, for instance, where formerly the evil was very great, it is now very rare for more than 6 per cent. to be demanded. For the nine years ending 1890 the total number of persons condemned in the

German Empire for usury was 466 out of 989 put upon their trial; but whereas in 1882 the convictions numbered 98—a percentage of 55 on the total number of the persons prosecuted—in 1890 the numbers had fallen to 22 and 34 respectively. It is true, as pointed out in the official *Motive* attached to the draft of the law of 1893, that in considering the statistics of conviction it must be taken into account that the mere existence of the law exercises a deterrent influence upon usurers. This same *Motive*, while confirming the view of the effectiveness of the law of 1880 within its own sphere (*sc.* that of *Kreditwucher*), admits that usury under other forms had increased considerably, especially in the country districts. Indeed, this seems universally admitted. How far the law of 1893 has been successful in combating *Sachwucher* it is as yet too early to determine clearly. But so much may be said—there has been a cessation of the grossest cases and further developments have been checked. As regards the future it is almost universally recognised that the complete remedy is to be found not in repressive legislation, but in economic measures.

One objection very constantly brought in Germany against the scheme of these laws remains to be noticed—namely, the indefiniteness of their provisions. "To the arbitrariness of a maximum rate of interest has succeeded the arbitrariness of the judge," says one writer. "To interpret this law," says another, "is one of the hardest tasks ever imposed on the German judicial bench." This difficulty, which accounts in part for the low percentage of convictions, is stated to be to a certain extent due to the fact that the judges who have to administer the law are not as a rule sufficiently conversant with the course of trade and business to appreciate the real nature of the transactions into the usurious character of which they have to enquire.

Austria.—The first country in Europe to release the stipulation of interest from all restraints, penal and civil, was Austria. This was carried out by a patent of Joseph II. at the beginning of 1787. The results were disastrous; and in 1803 the old law was restored in its entirety, and formally continued in force till 1866, though in fact it ceased to have much practical influence after a decree of January 1850 which removed all restrictions in the case of bills of exchange. The law of 1866, however, while repealing the old law introduced new penal provisions on the lines of the Baden law (see *supra*). These new provisions were very severely criticised, and in 1868 were repealed. Once again the new state of things produced by the long-wished-for freedom was the very opposite of what had been expected: in Galicia especially the grossest abuses sprang up, and in 1877 the Austrian Reichsrath, in answer to the most urgent entreaties of the local Galician Assembly, passed a new usury law, which was to apply only to Galicia, Lodomeria, and Bukowina. Most of the other provinces of the empire forthwith petitioned that this law should be extended to the whole empire. This was done by the law of May 28th, 1881, which is still in force,

and, except where otherwise noted, is on the lines of the German law of 1880.

The law of May 28th, 1881 :—

S. 1. This differs considerably from the German law. (*a*) There may be exploitation in reference to feebleness of understanding, and excitement (*Gemüthsaufregung*). (*b*) There is no mention of the usual rate of interest. (*c*) The borrower must be economically prejudiced. (*d*) All credit transactions come under the law.

The punishment is less severe—viz., rigorous imprisonment for one to three months, and a fine of one hundred to five hundred florins.

S. 2 relates to colourable transactions, the securing of usurious claims by obligations of honour, and the acquiring and enforcing or alienating of such claims.

S. 3. A second conviction entails liability to imprisonment for three months to one year, and a fine of five hundred to two thousand florins. Banishment may also be decreed.

S. 7. If the offender makes restitution before the court or the public prosecutor is seised of the matter, his criminal liability is at an end.

SS. 8-10. In ordinary cases the judge of the criminal court will declare the usurious transaction void. When for some reason criminal proceedings are impossible, the judge of a civil court may make a similar declaration.

S. 12. In case of civil proceedings, the judge is not bound by the ordinary rules of evidence.

S. 14. The law does not apply to business transactions in which *both* parties are traders, as defined by ss. 4 to 6 of the Code of Commerce, 1862.

S. 15. To exact from a minor, or from a person who is liable to be deprived of office for breaking his word of honour, a pledge of honour to fulfil an obligation of credit is a misdemeanour punishable with simple imprisonment for from eight days to three months.

In 1891 a draft penal code for Austria was introduced into the Reichsrath, and this, if eventually passed into law, will in effect substitute for s. 1 of the existing law provisions exactly corresponding to s. 302*a* of the German law of 1893, with the sole exception that there is no reference in the section as drafted to "the customary rate of interest."

What has been said about the operation of the German law applies for the most part to Austria as well. For the six years ending 1887 there were 370 convictions in the whole empire out of 658 prosecutions—that is to say, 57 per cent.; down to 1887 the number of convictions in each year was nearly constant—viz., 60 to 70; but in 1887 the number fell to 43. It is admitted that the law has not been altogether without good influence in some districts; but in Galicia, where the evil is most serious, the low state of civilisation of the peasantry is the real obstacle in the way of amelioration. There is at the present time a strong demand for more stringent legislation which shall in

the first place extend beyond the sphere of *Kreditwucher*, and, in the second, relieve judges of the embarrassing discretion now committed to them—a discretion exercised, it is alleged, in a not altogether satisfactory manner.

Hungary.—The law of 1877 (see *supra*) was found insufficient to meet the serious state of affairs produced by the practices of usurers, who at once began to veil their usurious loans behind other transactions, and in particular under the form of bills of exchange. Accordingly, the legislature, obeying a pressing public demand for criminal legislation, passed the law of 1883. This law, which consists of four parts, in its essentials follows the Austrian law of 1881 (see *supra*), but there are the following features of difference :—

S. 1. The bringing, or tending to bring, ruin on a surety (as well as on a principal debtor) is sufficient to constitute usury ; as also is (*cf.* the German law) a striking disproportion between what is given and what is received, without reference to the effect produced upon the economic condition of the borrower. The punishment may be as much as six months' imprisonment and a fine of two thousand florins. Deprivation of office and suspension of civil rights may also be inflicted.

S. 2 deals with circumstances of the same nature as those comprised in s. 2 of the Austrian law, but includes as well the practice of usury as a business (though nothing is said about habitual usurious practices) and the case of repeated convictions. Here again the punishment is more severe than in Austria—imprisonment up to two years, fine not exceeding four thousand florins, deprivation of office, and suspension of civil rights.

S. 4 differentiates this law from those of Austria and Germany. It declares (*cf.* the Russian law) that no criminal offence is committed unless interest (as defined by the law of 1877) at a higher rate than 8 per cent. has been stipulated for or received.

S. 9. Criminal proceedings may only be taken by the prejudiced party, his wife (husband), or ascendants or descendants. Proceedings once set on foot cannot be stayed by the prosecutor.

S. 10. In case of the general impoverishment of a district through usury, the minister of justice may upon a sufficient report of the state of affairs take action officially.

S. 16. The law does not apply to commercial transactions in which *the person who obtains credit* is a registered trader.

Part II. of the law corresponds with s. 15 of the Austrian law ; Part III. contains certain regulations as to interest ; and Part IV. regulates the giving of credit in houses of entertainment.

Norway.—In 1842 some steps were taken in the direction of freedom of interest, but nine years later a return was made to the *régime* of complete restriction. Certain relaxations in the existing law were again made in 1857, from which year the conventional rate was 5 per cent. ; but it was not till

1888 that the usury laws in their entirety were repealed. At the same time, it was not thought advisable to leave borrowers entirely without protection. The same statute which repealed the old usury laws contains provisions which punish usury with fine and imprisonment. The terms of the law, as regards the circumstances which constitute usury, are an almost exact reproduction of the German law of 1880. The only contracts affected by the law are contracts of loan, or perhaps of credit; and contracts punishable as usurious are for the purposes of the civil law void. Usury prosecutions are to be official.

A draft criminal code for Norway is at present under consideration, s. 295 of which extends the definition of usury so as to include what the Germans call *Sachwucher* (see *supra*).

Usury was a most serious evil in Norway during the first half of this century, and the old law was entirely ineffective in repressing it. In the country districts the evil has been successfully met, not so much by the existence of the usury law as by the establishment of rural banks, which are to be found in almost every parish. In towns there may still be some usury, but prosecutions for the offence are extremely rare.

Russia.—Up to 1879 the conventional rate was, under the Civil Code, 6 per cent., and at the same time the Penal Code of 1866 punished persons lending at a higher rate with a fine, and, on a repetition of the offence, with imprisonment; but a law of March 6th, 1879, allowed parties to fix their own rate. After an interval, however, of fourteen years, it was found necessary to take legislative measures against usury, and the law of 1893 was the result. It will be observed that this law stands alone in having specific provisions dealing with rural usury as opposed to usury which may occur in any locality, and that the latter can only exist in connection with money loans, whereas the former may arise out of any credit transaction.

The law of 1893.—Art. 1 punishes with imprisonment persons who, by way of trade, lend to inhabitants of the country either corn or other food, or money, to be repaid, in whole or in part, in corn, food, or labour, in cases where advantage has been taken of the misfortunes of the borrower to impose on him hard or unusual conditions. Transactions concluded under such conditions are to be void.

Art. 2. All loans of money at an excessive rate or subject to excessive deductions (*a*) where the borrower has been obliged, owing to a necessity of which the lender is aware, to accept onerous and prejudicial conditions, (*b*) where a professional money-lender has concealed excessive interests under some other form, are void, and the lender is liable to imprisonment for a term varying from two to sixteen months, with or without a fine not exceeding three hundred roubles.

Any person acquiring a usurious claim, with knowledge of its character, is liable to the same punishment. Adopting the same principle as the Hungarian law, this law declares that no interest is to be considered excessive

which does not represent a higher rate than 12 per cent. A repetition of any of these offences may be punished by, *inter alia*, loss of personal and class rights and deportation.

Switzerland.—Art. 83 of the Federal Code of Obligations reserves to the individual cantons the right of legislating on usury, and considerable divergencies exist between the usury laws of the different cantons. The Swiss people have voted the unification of all the civil and penal law, but this has not yet been carried out.

The following cantons have at the present day usury laws in force; they may be grouped as follows:—

(i) Cantons where usury is a penal offence constituted by the same circumstances in the main as usury under the German law of 1880 and (except in the case of Bern, where all credit transactions are included) arising only in case of loans. There is nothing in the laws of either this group or the second group which corresponds to the provisions in the German, Austrian, and Hungarian laws relative to the securing of usurious transactions by pledges of honour, and intended for the protection of military officers and persons in analogous positions.

Basel (Stadt).—A law of 1864 revoked all the existing dispositions, civil and penal, against usury. The present law dates from 1883.

St. Gallen.—Law of May 1884. This law does not quite follow the form of the German law; the circumstances which, coupled with exploitation amount to usury are: (*a*) not handing over to the debtor the loan in full, (*b*) unjustifiably high interest, (*c*) stipulation for other advantages, under whatever form, to the detriment of the debtor.

It does not appear that usurious transactions are void, but the judge is to order complete reparation to the borrower.

Art. 3. of the law requires every professional money-lender to keep proper books of account; these, as well as business letters and telegrams, are to be preserved for a considerable time after the date of the transactions referred to in them.

Bern.—Law of November 28th, 1887. An almost verbatim reproduction of the main provisions of the German law, except that it applies to all credit transactions.

Neuchâtel.—S. 404 of the Penal Code (February 12th, 1891). This law in effect follows the German law of 1880.

Solothurn.—The law of May 17th, 1878 (? February 25th, 1879), defines usury as exploitation (*simpliciter*, not exploitation of any specific characteristics of the borrower), coupled with the taking of interest or other advantages out of proportion to the usual price of money and the risk run. This is plainly very much wider than the German law, for it makes any over-reaching in connection with a loan amount to usury.

All persons exercising the profession of money-lenders are obliged to enter all their operations in a register with numbered pages, to deliver

a statement of the transaction to the borrower, and to exhibit in their office a notice of the conditions imposed, the rate of interest, etc.

(ii) Cantons where usury is a penal offence constituted by the same circumstances in the main as usury under the German law since 1893—viz., exploitation of certain specified characteristics in connection with any bilateral contract in such manner as to secure excessive advantages.

Zurich.—The old usury law was repealed in 1865, and the existing provisions, which are contained in the Penal Code (s. 181*a*) date from 1883. For the purpose of determining the punishment, the following are to be considered aggravating circumstances: (*a*) if the usurious advantage is very large, (*b*) the habitual practice of usury, (*c*) attempts to veil the real nature of the transaction, (*d*) the taking of bills of exchange.

Aargau.—The law of September 26th, 1887, is almost the same as the Zurich law, except that in addition the following are considered aggravating circumstances: (*a*) the taking advantage of confidential relations, (*b*) the fact that the lender has himself produced the embarrassed circumstances of the borrower.

Appenzell.—Penal Code, s. 135 (1878), agrees in essentials with the Zurich law.

Thurgau.—The law of April 24th, 1887, is on the same lines as the Aargau law, except that it has the additional provision as to hypothecary loans mentioned above, and that the aggravating circumstances are not quite the same. Transactions contravening the provisions of the law are not void, but what has been paid in excess of the legal rate may be recovered.

Valais.—The law of November 30th, 1887, modifying Art. 314 of the Penal Code, has a general clause on the lines of the other laws of this class, and in addition declares five other things (for one of these see *supra*) to be usury. The other four in reality amount simply to receiving, or getting a promise of, money or property at less than the minimum market price. No mention is made of exploitation in these cases.

Schaffhausen.—Penal Code, s. 230. This only applies (*a*) where the person over-reached is a minor, or (*b*) where the form of the contract is such as to prevent its real content being clearly seen.

Ticino.—The law of January 25th, 1873, modifying s. 387 and s. 235 of the Penal Code, deals (*a*) with the over-reaching of minors, lunatics, and the like, (*b*) with fraudulent attempts to affect the price of corn and other food stuffs (*Kornwucher*).

In addition to the cantons above mentioned, Schwyz (1854), Obwalden, Fribourg (Penal Code, s. 429), and Geneva (Penal Code, s. 333) have usury laws.

India.—The latest experiment in anti-usury legislation is the Indian Act (VI. of 1899), which came into operation on May 1st in this year. It is in form an Act amending the Indian Contract Act, 1872, and therein chiefly the definition of "undue influence." Its provisions are briefly as follows:—

S. 2 substitutes for s. 16 of the old law a new section with three sub-sections, of which the second in effect re-enacts the old law, according to which "undue influence" was defined by reference to particular sets of circumstances (taking advantage of mental incapacity, confidential relations, etc.); at the same time the definition is enlarged (sub-s. 1) so as to cover all cases "where the relations between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other." Where a person in such a position makes what appears to be an unconscionable bargain (sub-s. 3), the onus of proving the absence of undue influence is on such person.

S. 3. Contracts induced by undue influence are voidable at the option of the prejudiced party, and the court may set aside such contracts either absolutely or upon terms.

S. 4. Penal stipulations to take effect upon the breach of a contract are not to be enforced, but only compensation given.

The illustrations appended to s. 2 are rather suggestive. One of these draws attention to the fact that the section of course applies not only to loans, but to all credit transactions; and the case of a money-lender creditor making a fresh loan to a person already his debtor is taken as an instance of a person in a dominating position.

III.—Where there is no maximum rate, and where there is no definite usury law, but the courts have power to reduce excessive interest and sometimes to punish the taking of it.

British Guiana.—All laws against usury existing in the colony were repealed by Ordinance 1 of 1858.

Ordinance 7 of 1893 allows the court to reduce to such rate as it may think fit any interest claimed before it, where it is of opinion that the rate agreed upon is excessive and ought not to be enforced by legal process.

Cape of Good Hope.—In the absence of any direct enactment relating to usury, the law as to usury in this colony is to be derived from the principles of the Roman-Dutch law. What the rules of the Roman-Dutch law on this head actually are is somewhat doubtful; but so much is clear, that there is no law limiting the rate of interest to any particular amount, and that the question whether any particular transaction is usurious or extortionate must be determined by the special circumstances of the case. If a transaction is found, in fact, to be usurious, then the courts have power to modify the interest by reducing it to a reasonable rate. The whole question is discussed in the leading case of *Dyason* v. *Ruthven* (1860, 3 Searle), where the point is raised whether usury is a crime, and it appears to be the better view that it is not.

Down to 1879 some at any rate of the cases which in Germany would fall within the definition of *Sachwucher* could be dealt with under a

prevailing principle of the common (*i.e.*, Roman-Dutch) law—namely, the civil law doctrine of *læsio enormis*, which was held to apply not only to sales, but to all transactions. The doctrine, however, was abolished by s. 8 of Act 8 of 1879.

Ceylon.—There appears to be no ordinance of any date dealing with usury and the rate of interest. In default of direct enactment, therefore, the principles of Roman-Dutch law will apply here, as in the Cape of Good Hope, with this exception, that there is no doubt in this case whether usury is or is not a crime, inasmuch as there is a penal code for Ceylon which does not include usury in its list of offences.

The South African Republic.—According to a text book of the Transvaal laws, a person who takes excessive interest is guilty of usury and punished according to the circumstances. The only authority quoted in support of this proposition is *Van der Linden*, whom, in the case of *Dyason* v. *Ruthven*, the court in the Cape of Good Hope refused to follow.

As in the Cape of Good Hope, the courts would appear to have power to cut down excessive and usurious interest, although there is no maximum rate.

IV.—**Chile.**—This country stands quite by itself.

In the absence of express contract, interest is payable at the rate of 6 per cent., but parties are at liberty to fix their own rate. If, however, the agreed interest exceeds by one half the interest current at the time of the contract, the judge is to reduce it to the amount of such interest.

Two monographs on usury have been freely used throughout this article —more freely than would have been permissible if the works in question had been accessible to English readers; they are *Der Wucher Historisch und Dogmatisch Bearbeitet*, by Dr. H. Blodig, Vienna, 1892, and *Der Wucher*, by Dr. Leopold Caro, Leipsic, 1893. Both contain a wealth of information on this topic, and the second a very full bibliography.

Thanks for much information, most kindly supplied, are due from the writer to (amongst others) his friend Professor Grueber of Munich, M. Ernest Lehr of Lausanne, Professor Hagerup of Christiania, and Mr. T. Barclay of Paris.

ADOPTION IN INDIA.

[*Contributed by* JOHN D. MAYNE, ESQ.]

JUDGMENT OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL IN THE CASES OF BALUSU GURULINGASWAMI *v.* BALUSU RAMALAKSHMAMMA, AND RADHA MOHUN *v.* HARDAI BIBI (MARCH 9TH, 1899).

THIS judgment is curious as showing the sort of questions which perplex the minds of people in India, and is also interesting from the glimpses of comparative jurisprudence which it affords. The point for decision was merely whether an only son could be adopted. But this question, simple as it may appear, has been during the whole of the present century the subject of unending discussion and of conflicting decisions in every court of India. The difficulty arose from the fact that the religious law of Brahmanism has been injected into states of society to which its vital principles are foreign. Its practices are in a general way imitated and accepted, but without any belief in the reasonings on which it is founded. Hence variances are continually arising which the authority of the courts is invoked to restrain or to punish. The present is a remarkable instance of the sort.

Vasishtha, one of the early sages, who lived certainly before the Christian era, says, "Let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of his ancestors." This text itself presupposes and is founded on a whole cycle of Brahmanical beliefs. The happiness of each man after death depends upon his male offspring. A son, by his very birth, rescues him from the Hindu Hell. A son performs the funeral rites of his father, and presents to the manes of his father and that father's male ancestors those recurrent offerings which are necessary for the repose of the dead. He brings into the world other sons to continue the same services. In the absence of a son his place may be completely supplied by an adoption, provided that adoption is carried out with a rigorous obedience to the rules. Hence the paramount importance of strictly adhering to all the precepts laid down for that end. A breach of these may leave the souls of countless ancestors to suffer in torment, while an adopted son, who is himself no more than a sinful nullity, is performing idle and ineffectual rites. If an only son is adopted, is he a real son or

only a phantom? This is a question which for the first time came before the Privy Council last year.

In Bengal there was never any doubt upon the point. Pundits and judges alike agreed that such an adoption was absolutely and for all purposes invalid. Mr. Justice Dwas Kanath Mitter, himself a Brahman, and one of the greatest native judges who reached the High Court Bench, in two judgments declared with almost passionate earnestness that adoption was primarily and essentially a matter of religion; that although it resulted in civil rights, its first object was to procure religious benefits; that it was founded on, and must be tested by, religious rules. Both the giving and taking of an only son was a sin, and frustrated the purpose for which it was intended.

In Madras an intermediate line was taken. Pundits and judges all declared that such an adoption was forbidden, and therefore was most improper, but that if it was once carried out it was effectual. This apparent contradiction was embalmed in the maxim, *Quod fieri non debuit, factum valet.* As the courts were only consulted in regard to the secular results of an adoption, they offered no opinion as to the results which might follow to the disembodied spirits.

The High Court of Allahabad followed the example of Madras.

For many years it seemed as if Bombay was taking the same line. Such adoptions were frequently made, and when they were contested in court they were reprobated and condoned. In 1875, however, Sir Michael Westropp, C. J., brought about a change. In a case which did not actually require a decision upon the point he examined all the authorities bearing upon it, and pronounced a very strong opinion that such adoptions were invalid. The next time the case arose for decision he presided over a full bench court, which held the adoption to be invalid, and the decision has of course been followed in all subsequent cases. Finally, in 1898, two appeals to the Privy Council from Madras and Allahabad raised the point directly, and in a single judgment of a most elaborate and exhaustive character the committee held that such adoptions were valid.

The *factum valet* subterfuge was dismissed with little ceremony. Lord Hobhouse pointed out that an act which is distinctly forbidden must be illegal, and that if it is illegal before it is done it cannot become legal by being done. On the other hand, the spheres of morals and of law are different, and moral reprobation does not constitute a legal prohibition. He then discussed the text of Vasishtha, with the result that it was considered to be directory and not mandatory. The rest followed as a matter of course.

As a legal curiosity the problem ceases to be interesting when it is solved. But it is still worth asking how the problem ever arose. Why did such a number of people quietly and unhesitatingly do an act which every one agreed was sinful and improper? The obvious answer is, that

the people who thought such an act improper did not do it, and those who did it did not think it improper.

In Bengal people do not adopt only sons because Brahmanism is a living belief, and the great majority of the class who make adoptions either themselves entertain the same convictions as Mr. Justice Dwas Kanath Mitter or are guided by those who do. Among the Dravidian races of Southern India, Brahmanism as a religion does not exist; the belief in a future state, where happiness can be affected by ceremonies performed on earth, is unknown. The uses of a son begin and end in the upper world. The motives which dictated Vasishtha's prohibition are unintelligible to them. In Bombay, as in Madras and in other large districts of India, adoption is practised for the secular results following from it, and the most essential rules of the Sanskrit writers are disregarded. It is remarkable that the full bench case which decided in Bombay that the adoption of an only son was illegal was given in respect to a family of Singhayets, whose caste sprung from a schism against Brahmanism. When another such case arose in the same caste the legal point was uncontested, but the existence of a usage in the caste to make such adoptions was asserted and proved. Throughout India the Brahmans are a powerful and influential class. Their Hinduism is a respectable and fashionable thing, and is adopted and imitated by the classes who aim at a good position in society. Their secular usages are borrowed, but the beliefs which give vitality to the rules governing these usages do not exist. Probably the greatest, but most unconscious, merit of the Privy Council is that it is gradually separating the religious from the secular elements of Hindu law, and moulding it into a system which is tolerable to those who regulate the ordinary affairs of their life by rules which they do not understand.

JUDICIAL REFORM IN EGYPT.

[*Contributed by* Sir John Scott, K.C.M.G., D.C.L.,
Deputy Judge Advocate-General, and late Judicial Adviser to H.H. the Khedive.]

(Paper read before the Indian Section of the Society of Arts, April 27th, 1899.)

"Inter arma silent leges" and the splendid military achievements of the Soudan have diverted the attention of the students of modern Egypt from the progress made in the administration of justice in the country. I am very glad, therefore, to have this opportunity of placing before the public a short account of what has been done, under English guidance, to ensure evenhanded justice between native and native on the banks of the Nile.

There are, as every one is aware, various systems of justice in Egypt. The ordinary right of a state to impose upon all those who dwell within its limits the authority of its own laws, administered by its own courts of justice, does not yet prevail. Foreigners enjoy extra-territorial rights, and in criminal matters they are only amenable to their own consulate and their own laws; whilst their civil disputes *inter se* or with a native are placed under the exclusive cognisance of the mixed tribunals. This privilege of extra-territoriality was created by the capitulations which were granted in mediæval times, in order to induce foreigners to settle in the Ottoman dominions, and which are still in force. They had their justification, as far as Egypt was concerned, in the fact that until recently there was no such thing as native justice. But under the Cromer *régime* there has gradually grown up a national system of justice which will soon enable the Egyptian authorities to say to Europe, "We can now give you justice in our own courts; we ask that all who dwell in our country shall be amenable to the ordinary municipal tribunals and law." This is not a change that can be made by a stroke of the pen. The consent of the European Powers would be necessary, as, even if the mixed tribunals were abandoned, they could claim to re-establish consular courts. Naturally such a right would not be abandoned save on the strongest guarantee that sound justice would be administered by the Egyptian courts. Yet, speaking as a man who honestly cares for the country, and who, by long residence and constant desire to bring forward the Egyptian, might almost claim *droit de cité* as an Egyptian, I am absolutely convinced the native tribunals of Egypt must eventually be the only tribunals in the country.

The Native Tribunals.—It is of the progress of these native tribunals

that I wish to speak to-night. I was specially charged, as legal adviser to the Khedive for eight years (1890-98), with their development, whilst as an Appeal Judge in the mixed tribunals from 1876 to 1882 I had considerable experience of the time when Egypt possessed no native courts worthy of the name. In my account I may have to mention myself more than I like, but I wish to say at the outset that I never initiated any important reform in judicial organisation without having first explained and discussed it with the Khedive, the Minister of Justice, and the leading members of the Legislative Council, and without this co-operation I could not have succeeded. You may make a canal or a railway without the consent of a people, but you cannot make a system of justice.

But Egypt has many masters, and I have not yet mentioned the one on whom I most relied and who always did the best for the country. I mean Lord Cromer. As I said in my farewell speech to the Egyptian Judiciary, "His lordship knows the country and its needs better than any other man in Egypt, and he waits patiently till the moment has come when the reform can be made, and once he is convinced your plan is not only sensible but opportune, you are sure of his support, and this support I always had."

One of the secrets of Lord Cromer's remarkable success as an administrator lies in his patience. Each of his great reforms has had to wait its turn. When rebellion was suppressed and order restored, finance came first. "Put money in thy purse" is an essential preliminary to all progress. As soon as a sound financial system was established, he turned to the development of the sources of material wealth. He took public works in hand, and he never did a better stroke of business in all his busy life than when he persuaded the financial authorities of Egypt to place a million sterling at the disposal of Sir Colin Scott Moncrieff for the barrage and general irrigation. It resulted in a glorious success. But meanwhile Lord Cromer let justice and education wait outside the door; he had coquetted with justice, and even invited Sir Benson Maxwell at one time and Sir R. West at another to devise a plan of judicial organisation, and encouraged Nubar Pacha to form native courts. But the time had not yet come for his interference. However, in 1890, he wrote in his Annual General Report on Egypt, "Above all, the judicial and police systems require to be put on a sound footing." His lordship having thus decided that the time had come for judicial reform, did me the honour of asking me to leave my judicial work in India for a year, and to spend that year in Egypt, with the view of there studying native justice as it then was, and making a report as to the best mode of its reform. I was lent to Egypt by the Indian Government, and spent a year in visiting the tribunals, assisting at the hearings, talking with the judges, examining their records, and generally studying the actual system in its working all over the country, from Assouan to Alexandria.

The Old Judiciary.—Then I made my report. It was undoubtedly a gloomy document. I had found codes, good enough in themselves; but a large number of the judges, whose duty it was to interpret and apply the codes, were quite unfit for the work, whilst the executive did not enforce the decisions with any regularity. The judiciary themselves were timid as regards the executive authorities, the police were corrupt, and the mass of the people entirely refused to give any information as to the cause or the author of any crime in their district. There were only seven tribunals altogether in the country, while the great majority of the civil cases was so small, and the people were so poor, that the injured party could not afford to go any distance to obtain justice. There was no system whatever for the appointment of judges. A certain number were excellent magistrates, but many had been named arbitrarily by the Government, some by favour, some because they were unfit for the office they previously held. The Bar was even worse than the Bench. There were a good many decent judges, there was hardly one capable advocate. I pointed out clearly all these defects; but I insisted that reform was wanted, not revolution. I have a lawyer's dislike of radical remedies. They are very expensive, they disturb existing interests, and they upset the way of doing things to which the people have become accustomed. The native tribunals had been founded on the lines of the mixed tribunals, the French codes were the basis of their law, the people had to a certain extent got used to the French system, French was the foreign language then generally in use. As a judge of the mixed courts, I had applied French law and procedure and had found they worked fairly well. With the exception of the Englishmen in the Court of Appeal, there was hardly a person in the country who would have received with any favour a complete change in favour of an English system of law. I therefore urged that better men were wanted, not new measures. As I said in one of my reports, *tant valent les juges tant valent les lois.* After much hot discussion my report was finally accepted as the basis of judicial reform, and I was persuaded to give up my Indian career for this new work in Egypt—not, I confess, without great hesitation, as two eminent Englishmen had preceded me without success.

A New Judicial Staff.—Some cardinal changes were necessary as well as many minor ones. We began with what was essential—"Festina lente" was always my motto. A certain number of the judges were totally unfit for their post, and they could not be allowed to continue. There had been no regular system of judicial nominations, and many members of the Bench reminded one of Figaro's saying, "They wanted an arithmetician, and so they chose a dancing-master." For example, a doorkeeper of a recent Prime Minister had suddenly become a Judge of the Court of Appeal, and I could cite other equally flagrant cases. However, I consulted with the authorities of the Ministry of Justice and the best men of the judicial staff, and gradually, after careful sifting, we were able to put on the retired list the most unfit, the financial department providing them with pension according to their

years of service. But no judge was retired until we had found a better man to put in his place. By the end of my first year of office thirty-three new judges, about 30 per cent. of the judiciary, had been introduced in the place of the most incapable. We then made a strict rule that in the future a legal diploma was essential for judicial office. There was a school of law in Cairo, but it had been neglected to such an extent that it had not even a director. Fortunately a good many young Egyptians had recently obtained legal degrees in France and Italy, so that we had a certain choice—a somewhat youthful choice, no doubt—ready to hand. We at once set to work to regenerate the Egyptian school of law. We were luckily able to induce a professor of law from one of the universities of France to accept the direction, and he turned out a great success. No man in Egypt has done better by his pupils, no man is more loved and respected by them, than M. Testoud. In two years' time we had a good staff of teachers—French, Italian, and Egyptian—and one hundred pupils all being trained for the legal profession. The period of training was fixed at four years with annual examinations. As I was President of the Board of Examiners, I am in a position to say that the pupils worked excellently, though perhaps their enthusiasm was not so much from love of the study of law as from the desire to secure Government employment. Their main defect was one common in the East: they trusted too much to memory and did not think out sufficiently the codes and general principles of law for themselves. No pupil was admitted without a certificate that he had passed the secondary examination in the Government schools, so that they were sufficiently grounded in general knowledge.

Having laid down the condition that a legal diploma was necessary for judicial service, we next established a system of gradual promotion of the judges. My object was to found a real judiciary in the country. The successful candidates who had passed all examinations entered the service from the law school, in the lowest judicial class, at a salary of about £100 a year, and if they merited promotion they slowly climbed up the judicial ladder until they reached the Court of Appeal with a salary of about £800 a year, whilst Europeans received £1,000 a year. The principle of irremovability of judges was established for the Court of Appeal, whilst the judges of first instance had an almost equally certain tenure, as they could only be dismissed on proof of grave misconduct, established by a judicial inquiry conducted by the Court of Appeal. Of course a good many of the originally incapable ones still remained, but they were now in the minority, whilst the whole judiciary was undoubtedly leavened with a better spirit, and we continued very gradually to eliminate the most unfit by the inducement of pension or the offer of other administrative work. The salaries may not seem in England to be sufficient, but they are as high as those paid in continental countries for judicial work. For instance, in Paris the First President of the Court of Cassation receives only £1,200 a year. The other presidents receive £800, and ordinary members £720. Appeal

Judges receive £440 a year, Judges of First Instance £320, and *Juges de Paix* £120. In the provinces the salaries are less than they are in Paris. The salaries given are amply sufficient in Egypt for all the necessary requirements of life, and although a good salary does not make an honest official, it greatly lessens the temptations to dishonesty. A good salary, coupled with the certainty of tenure as long as they did their work well, made the post of judge the most popular function in the whole Egyptian administration.

The difficulty of finding good men for the post of judge, and the gradual increase in the number of cases set down for hearing, led us to consider how we could diminish the number of judges required for the present work, so as to set free some of them for new work.

The One-Judge System.—As an Englishman, I entertained strongly the opinion that the one-judge system in first instance was the best. It concentrates responsibility, whereas three or five judges sitting together so divides responsibility that often the majority of the court takes little interest in the business, and in practice everything is too much done by one man, whose individual action is saved from criticism by the presence of his colleagues. Of course I am only speaking of cases in first instance, but I felt that if I could improve the character and capacity of the first instance judges, and teach them to face the responsibility of sitting alone, the quality of the work done would be much improved, and a certain number of judges would be free for new work. In appeal, especially in appeal on points of law, I hardly need add the authority of a plurality of judges is necessary both to satisfy the public and to ensure a right decision. I met with great opposition at first when I proposed the one-judge system. Those were days when anything English was eyed with suspicion. The Egyptians themselves did not dislike the idea, as the Mahommedan judge, the cadi, always sits alone; but legal training in Egypt is based on French lines, and, save in the most trivial matters, a Frenchman holds the plurality of judges essential to the proper administration of justice. But I fortunately found that the *juge unique* system had been adopted in Algeria in the form of a *juge sommaire avec compétence étendue*, and eventually, after much discussion and considerable delay, the Council of Ministers decided in my favour, and I carried a Bill which enabled a single judge to decide in first instance all civil disputes where the value of the claim did not exceed £100, and all criminal cases where the maximum punishment that could be inflicted did not exceed two years' imprisonment. As an ancillary measure I carried a second Bill that established local courts of appeal of three judges, who heard, in final instance, all appeals from a single judge. And thus the Central Court of Appeal was left free to the due consideration of really important cases.

The introduction of the one-judge system at once placed at liberty a considerable number of judges. Up to that time there had only been in the country seven tribunals, with a central court of appeal, which heard all

appeals of every kind of importance. Petty appeals were now separated from important appeals, and we proceeded to distribute throughout the country, at centres most accessible to the people, single judges, who sat daily for the hearing of civil or criminal cases. The whole number of judges in the country was rather over a hundred ; the number of the Parquet, which in English may be described as the Public Prosecutor's department, was somewhat over seventy. Very gradually—our progress being dependent on grants from the Treasury for the establishment of these new tribunals—we established forty-five one-judge tribunals all over the country. We chose our judges partly from those whom the reform had set free and partly from the best men in the Public Prosecutor's department. As a further ancillary reform, I carried a measure which limited the right of appeal to cases where the amount in dispute was not less than £10. The result of these changes has been that the peasant, desirous to recover a small debt, say of a hundred piastres, is no longer obliged to travel many miles and obtain the decision of three judges, which decision, even if favourable, was liable to an appeal to a court in Cairo composed of five judges : he can now go to the town close by ; an officer of the court on his statement draws his claim for him ; it is served at once on his adversary ; a day is fixed for the hearing ; and as there are no arrears in any tribunal, he gets his decision on the appointed day. That decision can be executed by the summary court if the sum awarded is under £10 ; if the sum awarded is over £10, there can be an appeal, but that appeal goes, not to Cairo, as of old, but to the nearest provincial capital. The execution of judgments, which used to be arbitrarily withheld is now carried out by the administrative authorities as regularly as it is in England.

Judicial Superintendence.—The introduction and great expansion of the one-judge system rendered necessary the establishment of some system of judicial superintendence. Justice as the sole basis of social relations was an absolute novelty, and the new judges, though full of zeal and good intentions, were without experience. It had been necessary to choose young men, because the older generation had been brought up under an arbitrary system. The older judges required, perhaps more than the young ones, constant supervision as regards both the amount and the quality of their work. But I came to the conclusion that whilst superintendence was essential, the *revision* of judicial work was to be deprecated and avoided. Yet the Egyptian public could hardly believe in the impartiality and freedom from corruption of a judge, especially if he sat alone, isolated from his colleagues and free from all control. I know it will be difficult to persuade an English audience that the superintendence of judicial work and the inspection of judges can possibly be good things. Still, things that sound bad in theory are sometimes excellent in practice ; and England, with its centuries of freedom and education, cannot be taken as a model for an ignorant country like Egypt, which had been oppressed by foreign masters for a period beyond the memory of man. At any rate I had come from judicial work in India, and had myself taken part

in a system of judicial superintendence that had produced admirable results. Only a couple of days before I left India, one of the best judges on the Bombay Bench, who had spent thirty years of his life in the India Civil Service, and present here to-day, gave me a detailed account how the inspection and superintendence was conducted by the High Court and the district judges; and he assured me that the great success of the Judicial Department in India depended upon this superintendence of the subordinate judges. I bore this opinion in mind and determined to apply to Egypt the Indian plan, with such modifications as were necessary. I could not utilise the Supreme Court in Egypt. Its reputation was not sufficiently established to justify such an augmentation of its powers. Still less could I utilise the district judges. Yet I had to find men of such weight and authority for my committee of superintendence that their names would obtain universal respect. The office of Judicial Inspector existed in other parts of Turkey, but it was only a cloak to abuse, because the inspector was as corrupt as the judge. I had to find my men amongst the Europeans in the country. I decided on a committee of three, composed of the Judicial Adviser as President, with the Standing Counsel to Government, an Italian who had held high judicial office in his own country, and the *Procureur-Général*, a Belgian, who had also held high judicial office in his own country, as members. I thus secured a committee with European judicial rank which would ensure respect and confidence. I did not confer on this committee the power possessed by a High Court in India. In India a High Court can not only send for proceedings and require explanations of any subordinate judge and inspect the conduct of business in any subordinate court, but it has also a power to revise judgments and to alter sentences. I determined, as I have already said, to stop at superintendence. Consequently the Committee of Judicial Control in Egypt has no power to vary any judgment or sentence. The *decisions* are absolutely free from any control; but the committee, through its inspectors—at first three in number and now six—examines the *work* of every tribunal. The inspectors come from the upper ranks of the judicial body, half English, half native. They make reports to the committee once or twice a week. Their reports are examined and discussed by the committee, and whenever any fault is *made clear*, the fault is communicated to the judge concerned, or, if the matter is very important, notice is given by general circular to all the tribunals. In spite of much adverse outside criticism the plan has been received with cordiality, and every assistance has been given to it by all the judges throughout the country. The tribunals dread the reproaches of the committee, and the absence of any note or circular for any considerable period is considered by the judges a matter of congratulation. The necessity for fault-finding has diminished, but I am bound to add the day is still far distant when this superintendence can be entirely withdrawn. I must also say that it was never extended to the Supreme Court of Appeal, although it included the provincial appeal

courts, whose appellant power was much more limited. Everything possible was done to strengthen the prestige and independence of the Supreme Court of Appeal as the highest judicial authority in Egypt.

Before I leave the subject of judicial superintendence, I should like to add the opinion about it expressed by Lord Cromer and my successor, Mr. McIlwraith, in Lord Cromer's recent report on Egypt. Lord Cromer says: "I have on several recent occasions alluded to the Committee of Judicial Control which was instituted by Sir John Scott, and which constitutes one of the most valuable of recent reforms in the judicial administration of this country. I can now quote Mr. McIlwraith's testimony on this point. 'The system,' he says, 'has been the subject of much hostile criticism in some quarters, but it is found to work well in practice, and it has a marked educational influence on the native judiciary in stimulating their efforts generally and preventing the recurrence of particular errors of law."

The European Element.—The establishment of a judicial system in a country which had not known independence or justice for many centuries could hardly be secured without the assistance of Europeans. Lord Dufferin, in his report on the future of Egypt, maintained that European aid in the administration of justice would be necessary in the proportion of one European to three natives. It was difficult to find the right men at the rate of salary which Egypt could afford, and the advantage of Europeans all over the country, not knowing the people or their language, was very doubtful. We decided to concentrate European assistance in the Supreme Court of Appeal, and in the Courts of First Instance of Cairo and Alexandria. The Court of Appeal is now composed of twenty members, of whom ten are European and ten are Egyptian lawyers. There are two Europeans in the First Instance Tribunal at Cairo and one at Alexandria. The rest of the judges at the provincial capitals and at the forty-five judicial centres are all Egyptian. The majority are Mahommedans, but a due proportion of Christians, whether Koptic or Syrian, also hold judicial office.

Reduction of Fees.—One great obstacle to the increase of business in the native tribunals was their expense. The fees exacted were exorbitant; and as most of the civil claims were of very small amount, the people were deterred from coming to court. Several experiments in the way of reduction were made without much success, as a general diminution of costs was not favoured by the Treasury on account of the risk of loss of revenue. But eventually the financial authorities withdrew their opposition, with a result most satisfactory to themselves as well as to the country, and consented to a very great diminution of legal fees, which resulted in such an increase of legal business that the aggregate receipts were more than they were before. It is satisfactory to be able to state that the receipts in 1891 were £78,000, with a very high tariff, and in 1899 they reached £115,000, with a very low tariff, whilst the number of civil cases heard rose from 16,800 in 1891 to 69,400 in 1898, of which 68,445 are cases decided by a single judge.

Judicial Independence.—It is astonishing how rapidly a judicial *ésprit de corps* has sprung up in the country. The judiciary have now become an important body in the state, and are no longer, as they once were, neglected outsiders in the administration, who could be named and dismissed in a day, who received orders from the powers that be, and carried them out as if it was part of their duty. They are men of legal education possessing legal degrees. They have their proper place and rank in the Government service and at the State levées, and they wear judicial costume when in discharge of judicial functions. The Khedive, in his frequent journeys through the country, never fails to see the judges and tribunals. I must not take up time by many instances of judicial independence, but I will mention three. I remember three years ago one of the richest and most influential people in Lower Egypt was charged with forgery. He moved heaven and earth to save himself from punishment, and was absolutely astounded—he even sent his lawyer to complain to me—when the court below found him guilty, and the Court of Appeal confirmed the conviction. In the same year the son of one of the wealthiest proprietors in Egypt had chosen to amuse himself by organising a band of brigands, who attacked outlying villages, and robbed and killed as they used to do in the good old-fashioned times. He was just as much astonished as my friend the forger when he found himself doing a long period of penal servitude. Only last year a prince, cousin of the Khedive, great-grandson of the founder of the Khedivial family, walked into the principal club of Cairo with a loaded revolver and fired upon and wounded another prince of the Vice-Regal family with whom he had a quarrel. He, too, like the forger and the brigand, is suffering in a convict prison the effect of the new reign of equal law.

There was, however, a time of transition, when all arbitrary action was suddenly abandoned in favour of the impersonal action of law, a time at which it seemed as if the country was not ready for the change. The older-fashioned inhabitant shook his head and said it would not do. "They want the hand of a master, and the courbash is better than your codes," said one of the older Pachas to me. There was no doubt a risk in the experiment. In the old days guilty men may have escaped, innocent men may have suffered, but order was maintained. Whole villages were destroyed because murderers were not produced. Nubar Pacha once said that a woman could walk from Alexandria to Assouan with her gold bangles on her arms without the slightest risk of robbery. When the rule of law was declared, this security for a time disappeared. Bands of brigands were formed, and whole districts were considered unsafe. The police connived at crime; the peasants refused, from fear of revenge, to denounce any offender whether great or small. But this transitional period has now passed. It was at its height when I was appointed. There is now not a single band of brigands left in the country, and there are fewer crimes of violence in Egypt than there

are in France in proportion to the population. Not very long ago I had an interview, in a convict prison, with the most noted of all the brigand chiefs, a man named Ahmed Selim. He ought to have been hanged, for he had killed a great many people, but he had only been given penal servitude for life. He talked freely, and bitterly complained that the peasants had betrayed him to the police, which, he said, would never have happened in the old days. And he added: "There is no trade of robbery now; the peasants only rob and then go to work; and then they work, and then they go to rob."

I have already stated that the Parquet, composed of the *Procureur-Général* and his deputies, corresponds to the office of the Public Prosecutor in England, but at the outset of our reforms this description was not formerly quite accurate. The *Procureur-Général* was something between a counsel and a judge; he could even ask the court to acquit the prisoner, and really played the part of an extra judge, who was not only charged with the prosecution, but held the scales of justice in his hands. This system may work well enough in France or Italy, from whence it was borrowed, but it led to many acquittals in Egypt. A weak court, or a lazy court, really followed the lead of the *Procureur*, and did not take the trouble to examine the facts and decide for itself. After the usual amount of discussion, I obtained a change in the system, and the Parquet is now confined to the direction of the police in the investigation of crime, and to the development of the charges as prosecuting counsel when the case has reached the stage of final trial. In order to ensure the accomplishment of this reform, an Englishman was appointed as *Procureur-Général.*

Another change was made in favour of the speedy and certain repression of crime. The French system of the *Juge d'Instruction* had been at first adopted in its fulness. Every crime, however unimportant, had to go through the stage of judicial investigation before the *Juge d'Instruction.* The case was prepared by the police and the Parquet; but however complete it appeared, it had to be examined, and all the witnesses heard, by the *Juge d'Instruction*, who alone could send it to trial. This caused not only great delay, but was so inconvenient to witnesses that those who could give evidence always maintained they knew nothing, and the crime went without punishment for want of proof. We determined that only cases of great importance, requiring very delicate management in their preparation, should go through the preliminary of the *Juge d'Instruction.* The decision as to what cases should still be presented to him was entrusted to the Parquet. As a matter of fact the *Juge d'Instruction* is scarcely ever called upon; the cases are presented direct to the court, with the result of greater promptitude, increased ease of obtaining evidence, and a more certain punishment of crime.

Capital Punishment.—Until five years ago it was almost impossible to apply capital punishment as the extreme penalty of the law in the case of

crimes, however atrocious. Capital punishment was admitted as one of the penalties to be applied under the criminal code; but whilst this provision was adopted from the French law, another provision was introduced by Mahommedan professors which rendered the power almost illusory.

Art. 32 of the Egyptian Penal Code ran as follows:—"The death penalty can only be pronounced in the case of a confession, or if at least two witnesses give evidence that they saw the accused commit the crime."

This article led to two unfortunate results. The police from excess of zeal were either induced to extract confessions, true or false, by violence, or they suborned witnesses to swear falsely as to what they had seen. Under the new *régime* these methods were strictly forbidden, and consequently, as murderers do not as a rule commit the crime in the presence of others or confess their own guilt, capital punishment was hardly ever inflicted, even in the most atrocious cases of brutal murder. It was proposed to suppress Art. 32, and to prove the crime of murder, equally with other crimes, by the ordinary laws of evidence. The discussion lasted over a year, and the Mahommedan authorities finally yielded on its being shown that the penal code applied throughout the Ottoman Empire on the authority of the Sultan did not contain this exceptional provision. I hardly need add that capital punishment is still very rarely used; but in a country new to justice, where order and security are still imperfect, terrible cases of brutality sometimes occur which call for the punishment of death.

Perjury.—I will not trouble my audience with a detailed account of all the smaller changes we effected. There are one or two, however, I should like to mention. False testimony was terribly prevalent in the Egyptian tribunals. As in India, a judge's greatest difficulty was to find the truth in a heap of lies. Prosecutions for perjury were long and intricate. Some speedier remedy was required. We decided to empower the judge to treat flagrant perjury *séance tenante* as a contempt of court punishable by a very limited period of imprisonment. The power has been much used, and already the lying has considerably diminished.

Law Libraries.—Before 1891 there was not a single tribunal of first instance which possessed a law library. The judges had their codes, but that was all. Yet these codes were taken almost entirely from the legal system in use in France, and each French code has been explained at length in excellent commentaries compiled by eminent French lawyers. We selected those commentaries on the French codes which have the greatest authority in France, and sent a complete collection of them to every tribunal, great and small, throughout the country. I may add that all the judges read and talk French as well as they do Arabic. French and Arabic were the languages used on an equal footing in the school of law; only last year English teaching was added.

Law Reports.—Another change of some importance was made. Until a few years ago, no authorised reports were published of the decisions of

the native courts. Yet publicity at a certain stage of judicial institutions is not only a check on judicial carelessness, but acts also as a stimulant to the production of sound and well-considered judgments. An able lawyer, who was one of the editors of the reports of the mixed courts, undertook to publish monthly the reports of the decisions of the native courts, and the result has been excellent.

Prison Industries.—There was no useful labour in the prisons. We carried a Bill empowering the present authorities to impose such labour as was suitable to the prisoner, and now there are many prison industries which not only bring in money, but enable the man to earn an honest livelihood when he is set free. The measure was much opposed. I remember when I attended the Legislative Council to support it, one of the older-fashioned rose and asked if a Pacha was sent to prison would he have to work? I replied that I trusted the Pachas would never commit crimes, but if they did and were condemned they would have to work like anybody else. The Bill was passed by a very narrow majority. It was followed by a second measure, which enables the authorities to utilise prisoners for public works outside the prisons.

The prisons were defective in another and even more serious way. There was no distinction made between first offenders and hardened criminals, young boys and old men: all were herded together. Prisoners are now classified and segregated, and juvenile offenders are sent to an excellent reformatory, where they are taught a trade and to read and write.

The Cadi Courts.—There is one more point. The native courts have not at present any jurisdiction in questions of personal status—questions of marriage, alimony, divorce, or succession; such questions are decided according to the *cheria* or sacred law by the cadis, under the direction of the Grand Cadi. All students of the Koran know that the amount of jurisprudence to be found there is really small. Mr. Stanley Lane Poole tells us that chapters ii., iv., and v. contain all the law of the Koran, but even in those chapters ritual and ceremonial and morality are strangely mixed up with civil and criminal law. However, round the law of the Koran there has grown up a quantity of juridical literature—Arabic and Turkish—which is now given authority, and the cadi courts claim the exclusive right to administer it so far as it relates to personal status. These cadi courts had become subject to such abuse that they were a crying scandal. The country was hardly prepared for their fusion in the native tribunals. We therefore proposed to impose upon them a simple system of procedure—that is, of first-instance tribunals with an appeal court—and to give the winning party the right of execution of judgments concerning inheritance and succession. Our proposal was accepted. A system of inspection analogous to that practised in the native courts was also created, and the control of the property of orphan minors was placed in the hands of the native Court of Appeal. More important still was a proposal to fuse the Grand Cadi's Court of

Appeal with the Mahommedan members of the native Court of Appeal. This proposal, which I left in the hands of Mr. McIlwraith, my able successor, was accepted, thanks to his advocacy, but it has not yet become law on account of the opposition of the Legislative Council, which may lead to the fusion of the religious with the ordinary tribunals. Such a fusion would be most welcome in the country. It would be the forerunner of a still more important amalgamation. It was the ambition of Nubar Pacha, it was my ambition, it was the ambition of every lover of Egypt, to steadily improve the native courts until they could fairly claim to administer every form of justice to every class of suitor, and to every nationality. It will take time. They are not yet ready. But I hope you agree with me that they are on the way.

"**Justice**": **Its Realisation.**—Now I have told my story, I trust without wearying my readers. I propose to conclude my lecture with the final words I spoke at the leave-taking with my friends in Egypt last May: "I came to Egypt first in 1872 as a perfect stranger. I was welcomed on all sides as a friend, and from that day to this I have received nothing but kindness from all who dwell in Egypt. It is a satisfaction for me to feel that I have done some little good in the country which has treated me so kindly and which I love so well. Sir Edward Malet, in a valedictory speech in 1883, declared his great wish for the country was 'Justice, Justice, Justice.' I am proud to think I have had a part in the realisation of this grand desire. I found in 1890 a set of native tribunals that were struggling for existence. I leave behind me a set of national tribunals which will, I trust, be the backbone of the country for all time."

P.S.—I am glad to be able to report a steady development of the judicial system since I left the country in May 1898. English professors are now added to the teaching staff of the School of Law, and English is one of the languages now in use there. This is a necessary preliminary to the introduction of English as a judicial language in the courts, which will come in due time. The tendency on the part of the mixed courts to overstep the proper limit of their jurisdiction has received a salutary check at the hands of the European powers interested in them. Reform in the religious courts met with unexpected opposition, which had its source in anti-English, pro-Turkish intrigue. The proposed improvements are under examination at the hands of a commission. But the Grand Mufti, who was essentially one of the old school, has been replaced by a Mahommedan lawyer of great learning and honesty, who fully recognises the necessity of reform. Another change of persons effected in the last year will also have a most salutary effect. Mr. Bond, a sound lawyer, knowing both the English and French systems, and an excellent Arabic scholar, has been appointed Vice-President of the Court of Appeal.

COMPARATIVE LUNACY LAW.

[*Contributed by* A. Wood Renton, Esq.]

During recent years the comparative law of lunacy has acquired considerable importance. Questions have been raised not only in this country, but on the Continent and in America as to the adequacy of the existing machinery for securing the committal of persons of unsound mind to receptacles for the insane; and problems of considerable delicacy have presented themselves to the legal tribunals for solution with regard to the weight to be assigned to ex-territorial declarations of lunacy and to applications by curators or committees appointed in pursuance of such declarations for the delivery over of property within the jurisdiction belonging to the lunatics for whom they act.

Under these circumstances, an examination of a number of typical systems of lunacy administration may not be inopportune. It may suggest practical reforms in lunacy legislation; it may also throw light on the question—which is always one of the critical issues in applications for the transfer of property to committees or foreign curators—how far there is in some of the cases analysed a vesting of the lunatic's property in the representative assigned to him by the law.

I.—ENGLAND AND WALES.

[Note that "1890" means the Lunacy Act, 1890; "1891" the Lunacy Act, 1891.]

Reception of Lunatics into Asylums, etc.—1. *Reception orders on petition.* Subject to the exceptions of urgency cases and criminal lunatics, a person, not being a pauper or a lunatic so found by inquisition, cannot be received and detained as a lunatic in an institution for lunatics, or as a single patient, unless under a reception order made by "the judicial authority."[1] The detention of a lunatic is justifiable at common law if necessary for his safety or that of others (*Brookshaw* v. *Hopkins* [1773] Lofft. 235-240; *Anderson* v. *Burrows* [1830] 4 C. & P. 210; *Scott* v. *Wakem* [1862] 3 F. & F. 328; *Symm* v. *Fraser* [1862]; *ibid.*, 859). The order is obtained on a private application by petition, accompanied by a statement of particulars and by two

[1] "The judicial authority" is a justice of the peace specially appointed by the justices of every county and quarter sessions borough annually, or a county court judge or magistrate—the two last of whom may decline, however, to act if their doing so would interfere with the proper discharge of their ordinary jurisdiction (1890, ss. 9, 10, and 11; 1891, ss. 24 and 25).

medical certificates on separate sheets of paper (1890, s. 4 [2]). The petition is to be presented if possible by the husband or wife or a relative of the alleged lunatic. If not so presented, it must contain an explanation of the fact, and of the connection of the petitioner with the alleged lunatic, and the circumstances under which he presents the petition (1890, s. 5 [1]). As to the policy of these provisions see Thirty-Third Report of the Commissioners in Lunacy, at p. 129. The wilful mis-statement of any material fact in a petition is a misdemeanour (1890, s. 317 [1]). No person is competent to present a petition unless he is at least twenty-one years of age, and has within fourteen days before the presentation of the petition personally seen the alleged lunatic (1890, s. 5 [2]). On the presentation of the petition, the judicial authority considers the allegation in the petition, the statement of particulars, and the certificates. If he is satisfied, he may make an order forthwith; if not, he appoints a time not more than seven days after the presentation of the petition for the consideration, and may make any further enquiries that he thinks proper in the meantime. Notice of the time and place fixed for hearing the petition is given to the petitioner. The hearing is private. No one but the alleged lunatic (unless the judicial authority otherwise order), the petitioner, one person appointed by the alleged lunatic for that purpose, and the persons signing the medical certificates accompanying the petition, is, without the leave of the judicial authority, allowed to be present (1890, s. 6 [3]). At the consideration, the judicial authority may make an order, or dismiss the petition, or again adjourn the case for not more than fourteen days for further evidence or information. If a reception order is made, the lunatic may be received into any institution for lunatics—the order, if in proper form and accompanied by the requisite medical certificates, being a sufficient authority for the reception.

2. *Urgency orders.*—In cases of urgency, or where, and only where (*In re Cathcart* [1893] 1 Ch. 475), it is expedient for the welfare of a person (not a pauper) alleged to be a lunatic, or for the public safety, detention for not more than seven days or, if a petition for a reception order is pending, till it is finally disposed of (1890, s. 11 [6]), may be effected under an urgency order—analogous to and borrowed from the Scotch emergency certificate—made, if possible, by the husband or wife, or by a relative of the alleged lunatic, and accompanied by one medical certificate (1890, s. 11 [1]).

3. *Reception after inquisition.*—This may be effected under an order signed by the committee of the person, or, if none has been appointed, by the Master in Lunacy (1890, s. 12).

4. *Summary reception orders.*—These are orders for the reception of lunatics made by justices otherwise than upon petition (1890, s. 19). There are four classes of cases in which such orders are made:—

(1) *Lunatics (not paupers, and not wandering at large) who are not under proper care and control, or are cruelly treated or neglected.*

(2) *Resident pauper lunatics.*

(3) *Lunatics (whether pauper or not) wandering at large.*

(4) *Lunatics in workhouses.*

(5) *Reception under Commissioners' order.*

Minute and complicated provisions are contained in ss. 28-33 of the Lunacy Act of 1890 for securing the explicitness and disinterestedness of certificates, etc. A reception order expires at the end of one year from its date, unless extended by the Commissioners (1890, s. 38 [2], [4]) or the patient is re-certified (1891, s. 7). The detention of a lunatic after the expiry of the reception order is a misdemeanour (1890, s. 38 [7]).

Care and Treatment of Lunatics in Asylums.—The main features deserving consideration under this head are these :—

1. *Mechanical restraint.*—This is not to be applied to any lunatic unless the restraint is necessary for purposes of surgical or medical treatment, or to prevent the lunatic from injuring himself and others (1890, s. 40 [1]). In many asylums, both in England and in the United States, mechanical restraint is unknown. An interesting discussion of the whole subject by English and American experts will be found in the *New York Medico-Legal Society's Papers*, vol. iii., p. 35. By the Model Regulations made under the Inebriates Act, 1898, mechanical restraint in certified inebriate reformatories is limited to the strait-jacket.

2. The privacy of *correspondence* between patients and the Lord Chancellor.

3. *Access* of friends and relations to patients.

4. The employment of *males* in the personal custody of females, except on occasions of urgency, is prohibited under a maximum penalty of £20 (1890, s. 53). Considerable abuses seem to have resulted in former times, both in this country and abroad, from the employment of male attendants in the custody of female patients (cf. *Parly. Debates*, 1816, vol. xxxiv., p. 1127—speech by Lord R. Seymour; and *History of York Lunatic Asylum*, by Jonathan Gray, p. 6).

5. The *boarding out* of pauper lunatics confined in such asylum with relatives or friends. The most extended application of the principle of boarding out is that made in the Gheel Colony. "Boarding out" is, however, a regular part of asylum administration in Scotland.

6. A *report* as to the mental and bodily condition of the patient is to be sent to the Commissioners in Lunacy at the expiration of a month. Special visits may also be paid, and the Commissioners may make orders of discharge (1890, s. 39).

Discharge of Lunatics.—The law provides for the discharge of lunatics (*a*) on recovery (1890, s. 83); (*b*) by *habeas corpus*; (*c*) by the authority liable for the maintenance of paupers in hospitals or licensed houses (*ibid.*, s. 73), unless the medical officer or medical attendant certify against it, in which case the written consent of the Commissioners is required (*ibid.*, s. 74); and, further, for the discharge by visitors of lunatics in licensed houses and of patients in asylums (*ibid.*, ss. 77 and 78), of paupers by relatives or friends (*ibid.*, s. 79); and for the discharge from workhouses by the guardians (*ibid.*, s. 81; see also 1890, s. 49, as to discharge by Commissioners on certificate by two medical men; and cf. *Reg. v. Commissioners in Lunacy* [1897] 1 Q.B. 630). There is a salutary rule that any person who considers himself to have been unjustly detained is entitled, on his discharge, to obtain from the secretary to the Lunacy Commissioners, free of expense, a copy of the documents under which he was confined (1890, s. 82). Provision is made for (i) inquests in cases of suspicious death, etc. (*ibid.*, s. 84); (ii) and for *post mortems*, whether inquests are held or not.

Classification of Receptacles for the Insane.—The *classification* of receptacles for the insane in England may be conveniently noticed here :—

1. INSTITUTIONS FOR LUNATICS, including (see 1890, s. 341) asylums, licensed houses, and registered hospitals.

The *asylums* are provided by counties or boroughs, or by unions of counties and boroughs (*ibid.*, s. 341). As to the modes in which asylums are provided, see 1890, ss. 242, *et seq.*

Licensed houses are houses licensed "within the immediate jurisdiction" of the Commissioners in Lunacy by the Commissioners and elsewhere by the justices for every county and quarter sessions' borough.

Registered hospitals, 1890, ss. 207 and 231.

2. Workhouses.

3. Houses in which pauper lunatics are *boarded out* with relatives or friends.

4. Private Houses (unlicensed), in each of which not more than one single patient may be detained (1890, s. 315 [3]), unless the Commissioners in Lunacy assent (1890, s. 46). No lunatic or alleged lunatic may be detained in an unlicensed house *for payment* (*ibid.*, s. 315 [1]).

Visitation of Receptacles for the Insane.—The ordinary duties of visitation are divided between

(1) *The Commissioners in Lunacy.*

(2) *The Chancery visitors.*

(3) *Various other visitors and visiting committees.*

Methods of Dealing with the Property of Lunatics.—*The jurisdiction in lunacy.* Under the unrepealed Statute *De Praerogativâ Regis* (17 Edw. II., cc. 9 and 10), the care and custody of lunatics belong to the Crown. The Crown has, however, at least from the sixteenth century, exercised this control by delegates, and principally through the Lord Chancellor as keeper of the conscience of the Sovereign. The term "Judge in Lunacy" (1890, s. 108 [1]) means either the Lord Chancellor for the time being intrusted under the Royal Sign-manual with the care and commitment of the custody of the persons and estates of lunatics, acting alone or jointly with any one or more of such judges of the Supreme Court as may for the time being be so intrusted, or by one or more of such judges. In practice, lunacy jurisdiction is at present exercised by (1) *The Lords Justices in Lunacy* and any other judge of the Supreme Court (*e.g.*, the present Master of the Rolls, to whom, *virtute officii*, no lunacy jurisdiction belongs), intrusted under the sign-manual; (2) *County Court Judges*; (3) *Masters in Lunacy.*

Modes in which the Jurisdiction in Lunacy is Exercised.—These may be grouped under five headings:

1. *Inquisitions.*

2. *Summary proceedings* (i) *under s.* 116 *of the Act of* 1890; (ii) *in small cases.*

3. *Proceedings consequential on inquisitions, etc.*

4. *Traverse.*

5. *Supersedeas.*

The two first can only be touched on here.

1. *Inquisitions.*—An inquisition is ordered by the Judge in Lunacy (not a Master) on the petition generally of a near relative of the alleged lunatic, supported by affidavits of medical men. The order specifies whether the inquisition is to be held with or without a jury. The inquisition is with a jury (1) if the alleged lunatic being within the jurisdiction demands it (1890, s. 90 [2]), unless the judge is satisfied that the alleged lunatic is not competent to form and express a wish in that behalf (*ibid.*, s. 91), and even in such cases the masters have power to direct an inquisition before a jury on consideration of the evidence (*ibid.*, s. 93); (2) if the alleged lunatic is out of the jurisdiction (*ibid.*, s. 96); (3) where the Judge in Lunacy directs it, although the alleged lunatic being within the jurisdiction has not demanded it (1890, s. 92). An inquisition may be held in the case of an alien (*In re Bariatinski* [1845] 1 Ph. 375) (*a*) resident within the jurisdiction, either temporarily or permanently, and possessing property there; (*b*) resident abroad, but possessing property within the jurisdiction; (*c*) resident within the jurisdiction without possessing property there (*In re Houstoun* [1826] 1 Russ. 312); and also against a subject under similar conditions. The only special points in connection with inquisitions that require to be noted are these: In practice, a jury of thirty-four is summoned; twelve must concur in the verdict; counsel in proceedings against an alleged lunatic ought to act in the

judicial spirit expected from counsel for the prosecution in criminal cases (per Bowen, L. J., in *In re B.* [1892], 3 Ch. 198). The issue on an inquisition is "whether or not the alleged lunatic is at the time of the inquisition of unsound mind and incapable of managing himself and his affairs" ([1890], s. 98 [1]): but it may be specially found and certified that the lunatic, though incapable of managing his affairs, is capable of managing himself and not dangerous to others (*ibid.*, s. 98 [2]); and—without the direction of the person holding the inquisition—no evidence as to the lunatic's acts, etc., at any time being more than two years before the inquisition is to be receivable (*ibid.*, s. 98 [1]). This restriction was imposed to prevent such roving enquiries into the whole life of an alleged lunatic as were instituted in the *Windham* case. The only remaining feature which requires to be noticed is the personal examination of the alleged lunatic by the master and jury, where there is one. The examination may be on oath or otherwise ([1890], s. 92), and may be held either in open court or in private, as may be directed (*ibid.*, s. 94 [2]; 1891, s. 26 [1]); and the alleged lunatic has a right to insist on its taking place. An inquisition may be held before a jury on an issue remitted to the High Court. Only one case of the kind has so far occurred, *In re Scott* [1884], 27 Ch. D. 116.

2. *Summary proceedings.*—(1) *Under s.* 116 *of the Lunacy Act* [1890]. This section enables the Judge in Lunacy—a term which for this purpose includes the master—to apply the wide powers of administration and management existing under the Acts, without inquisition in certain classes of cases. (2) *In small property cases* [1890], s. 132.

3. *Proceedings consequential on inquisitions, etc.*—The results of an inquisition are worked out in the chambers of the Masters in Lunacy. The most important of these is *the commitment of the person and the estate* of the lunatic. The committees of a lunatic correspond roughly with the tutors and curators of the civil law. (See also below: FRANCE.)

The powers of management and administration exercised by the committee over the estate of the lunatic, with the sanction or by the order of the judge, include (i) *the raising of money* by sale, charge, etc., to pay the lunatic's debts or provide for his past or future maintenance ([1890], s. 117 [1], [2]); (ii) *charges* for permanent improvements ([1890], s. 118); (iii) *sale* of any property belonging to the lunatic (*ibid.*, s. 120 [*a*]; cf. *In re Salt* [1896], 1 Ch. 117, and cases there cited); (iv) *exchange* or *partition* ([1890], s. 120 [*b*]); (v) carrying on of *trade*, etc., of lunatic (*ibid.*, [*c*]); (vi) the grant of *building or agricultural leases*, etc. (*ibid.*, [*d*], [*e*]); (vii) *surrendering* leases, etc. (*ibid.*, [*f*]); (viii) *execution of powers* of leasing (*ibid.*, [*h*]); (ix) *performance of contracts* relating to property entered into before lunacy (*ibid.*, [*i*]); (x) exercise of *beneficial* or *fiduciary* powers (*ibid.*, s. 128), etc.

The English Courts and Foreign Curators.—Within the past few years, and notably during 1898, there has been an interesting development of the law as to the attitude which our courts assume towards applications by the curators of lunatics out of the jurisdiction to obtain the transfer of funds belonging to the lunatic in England. Some of these applications have been made in Chancery, others have been addressed to the Court in Lunacy. The root of lunacy jurisdiction on this subject is now s. 134 of the Lunacy Act [1890]—re-enacting s. 141 of the Lunacy Regulation Act [1853] (16 & 17 Vict., c. 70). It provides that where any "stock" (as to the definition of which term see s. 341 of the Act of 1890, and note that "stock" includes shares in companies—*In re Knight*, 67 Law J. Rep. Chanc. 136; [1898], 1 Ch. 257) is standing in the name of or vested in a person residing out of the jurisdiction of the High Court, the Judge in Lunacy, upon proof to his satisfaction that the person has been declared lunatic, and

that his personal estate has been vested in a person appointed for the management thereof, according to the law of the place where he is residing, may order some fit person to make such transfer of the stock or any part thereof into the name of the person so appointed or otherwise, and also to receive and pay over the dividends thereof as the judge thinks fit. The results of the decisions on this section appear to be as follows :—

(1) To enable the Court in Lunacy to act under it at all, there must be such a judicial declaration of lunacy as to effect a change in the legal status of the lunatic, and to vest—in a sense which will be explained immediately—his personal estate in a person appointed for the management thereof, according to the law of the place where the lunatic is residing (*In re Clyde*, W. N. [1889], 43).

(2) In considering whether there has been a judicial declaration of lunacy, the court will look to the substance rather than to the form of the declaration (*In re Tarratt* [1884], 51 L.T. 310, *Grimwood* v. *Bartels* [1877], 46 Law J. Rep. Chanc. 788 ; *In re Barlow's Will* [1887], 36 Ch. D., at p. 292).

(3) As a condition for obtaining the order, the curator must satisfy the court by evidence that the property is *required* for the maintenance or other purposes of the lunatic (*In re Knight, ubi sup.*, at p. 257), and the grounds on which the transfer is required should be stated (s.c.). The court under this section will limit (*Newton* v. *Manning* [1849], 1 Man. & G. 362, decided under 1 Wm. IV., c. 65), but will be slow to enlarge (*In re Morgan* [1849], 1 H. & T. 212) its jurisdiction in conformity with the law of the country where the lunatic has been so declared.

(4) A *curator bonis* duly appointed by a Scotch, foreign, or colonial court stands in the same position as a committee in regard to suing in England in the name of the lunatic under his care or charge (cf. *Scott* v. *Bentley* [1855], 1 Kay & J. 281 ; *Grimwood* v. *Bartels, ubi sup.* ; *Sylva* v. *Da Costa* [1803], 8 Ves. 316; *In re De Linden, De Hayn* v. *Garland*, 66 Law J. Rep. Chanc. 295 ; [1897], 1 Chanc. 453 ; and see s. 131, sub-s. [2], [3], of the Lunacy Act [1890] ; *In re Chatard's Settlement* [1899], 1 Ch. 712).

The case of *In re De Linden* [1897], 1 Ch. 453, deserves a brief separate notice. There a fund was standing to the credit, in the Chancery Division, of a lady of unsound mind who was resident in Bavaria, representing the share to which she was entitled under her parents' marriage settlement. The lunatic was the daughter of a German father and an English mother, and she and her nearest living relatives were domiciled German subjects. She had been found lunatic by the Royal Bavarian Court, and made a ward of that court on that ground. According to the law of Bavaria, the court in such cases acts not merely in a judicial, but in an administrative capacity, very much like the English Court of Lunacy. The administrative section of the court is called a "deposit commission," and this body has full power to give receipts for all the property of the lunatic. In the present case the commission consisted of the next friend of the lunatic, who was also a judge of the court, and another official. The fund in court was the lady's sole property. An application was made to Stirling, J., by the next friend, on behalf of the commission, to pay out the corpus of the fund as well as the income. Stirling, J., following the analogy of *In re Brown* [1895], 2 Ch. 666, held that he had jurisdiction to make the order and that it ought to be made. It will be observed, if the two cases are compared, (i) that here, as in *In re Brown*, there was a judicial declaration of lunacy; but (ii) that the case was stronger than *In re Brown*, inasmuch as in *De Linden's* case there existed a permanent arrangement for the charge and care of the lunatic's property by the deposit commission, which had power to grant receipts.

Insane Persons and the Criminal Law.—The question of the criminal responsibility of the insane lies outside the scope of this article. All that is proposed is to indicate, in the most general way, the nature of the special procedure applicable to criminals alleged to be insane.

1. Insanity (the question of degree cannot here be discussed) arrests the action of the criminal law at every point, from arraignment down to punishment.

2. Under the authority of the Criminal Lunatics Act [1860], Broadmoor Asylum in Berkshire has been appointed a criminal lunatic asylum for England.

3. Criminal lunatics are committed to this asylum (*a*) if on arraignment they are found by the jury unfit to plead (39 & 40 Geo. III., c. 94, s. 2); (*b*) if on trial they are found by the jury guilty, but insane at the time of committing the offences charged (Trial of Lunatics Act [1883]),[1] [in (*a*) (*b*) the order, which is for detention during "the Queen's pleasure," is made by the judge trying the case]; (*c*) under the Home Secretary's warrant, on the certificate of two medical practitioners called in by any two members of the visiting committee of a prison where a prisoner *not under sentence of death is confined* (Criminal Lunatics Act [1884], s. 2 [3]; and as to prisoners under sentence of death, see *ibid.*, [4]).

4. The Criminal Lunatics Acts contain provisions similar to those in the Lunacy Act [1890], as to the discharge (conditional or absolute) and transfer of criminal lunatics, and the detention of persons becoming pauper lunatics.

5. The expenses of maintenance of criminal lunatics are defrayed out of moneys provided by Parliament (*Hansard*, 3rd ser., vol. ccxc., p. 75; 139 Com. Jo. 336, 340, 344; Crim. Luns. Act [1884], s. 10).

6. The Lunatics' Removal (India) Act [1851] provides for the removal to a criminal lunatic asylum in this country of persons found guilty of crimes and offences in India, and acquitted on the ground of insanity (see *In re Maltby* [1881], 7 Q.B.D. 18, as to the construction of the statute). Similar provisions with regard to colonial criminal lunatics are contained in the Colonial Prisoners' Removal Act [1884]. The policy of this statute has been followed in the New South Wales Convention Act [1894], (58 Vict., No. 5), and in the Falkland Islands Lunacy Ordinance [1895], (No. 2), which enables the Governor in Council to send lunatics in gaols in the colony to the United Kingdom. There appears to be no lunatic asylum in the Falkland Islands (see *Jour. Society of Compar. Legis.* [1896], vol. i., pp. 25 and 102; see further, *Jour. Society of Compar. Legis.* [1899], pp. 124, 137, and 146-7).

The English statutes as to criminal lunatics are numerous, range from 1800 to 1884, and stand greatly in need of codification.

II.—FRANCE.[2]

Interdiction.—One of the most distinctive features of French lunacy law is interdiction. Historically it preceded the existing French legislation with reference to asylums, and may therefore conveniently be considered first.

A person of full age who is in a usual state of imbecility, insanity, or madness shall be interdicted, even if such condition is accompanied by lucid moments (Civil Code, Art. 489).

[1] Prior to this statute, the verdict was "not guilty on the ground of insanity." The change was made in the hope that the formal conviction recorded in the next verdict might have a deterrent effect on the mentally unstable.

[2] For the notes on "interdiction" and for the introductory remarks on the French Asylum System, I am indebted to Mr. Thomas Barclay, of Paris.

Any relative is allowed to apply for the interdiction of his relative. In like manner, any married person may do the same for his wife or her husband (Art. 490).

In case of madness, if the interdiction is not applied for by the husband or wife or the relatives, the Republic's Attorney (Public Prosecutor) must do so; and in cases of imbecility or insanity he can likewise apply for the same against a person who has no husband or wife or parents (relations) known (Art. 491).

All applications for interdiction shall be made to the Tribunal of First Instance (Art. 492).

Acts of imbecility, insanity, or madness shall be stated in writing, Those who apply for the interdiction shall produce the witnesses and papers (Art 493).

The tribunal shall order the family council[1] to give its opinion on the condition of the person whose interdiction is sought for (Art. 494).

Those who have applied for the interdiction cannot form part of the family council; nevertheless, the husband or wife, and the children of the person whose interdiction is sought for, can be admitted without having the power to vote (Art. 495).

After having received the opinion of the family council, the tribunal shall examine the defendant in the judge's room; if he cannot appear there, he shall be examined at his home by one of the judges appointed for that purpose, attended by his clerk. In all cases the Public Prosecutor (*Procureur de la République*) shall be present at the examination (Art. 496).

After the first examination, the tribunal shall, if necessary, appoint a temporary administrator to look after the person and property of the defendant (Art. 497).

A judgment upon an application for interdiction can only be rendered at a public sitting after the parties have been heard or summoned (Art. 498).

If the tribunal rejects the application for interdiction, it can nevertheless, if the circumstances require it, order that the defendant shall no longer be allowed to go to law, compromise, borrow, receive capital or give discharges therefor, convey or mortgage his property without the assistance of a counsel, who shall be appointed to him by the same judgment (Art. 499).

In case of appeal from a judgment rendered in the Court of First Instance the Court of Appeal may, if it deems it necessary, again examine the person whose interdiction is applied for, or have him examined by a commissioner. (Art. 500).

All decrees or judgments ordering interdiction or the appointment of a counsel shall, at the instigation of the plaintiffs, be docketed, served upon the

[1] A family council is composed of six blood relatives in as near a degree of relationship to the lunatic as possible; if there are not six, relatives by marriage are then chosen. Such a council is always presided over by the *Juge de Paix* of the district where the lunatic is domiciled (Civil Code, Arts. 407 and 408).

parties, and recorded, within ten days, among the notices which must be posted in the court room and in the offices of the notaries of the district (Art. 501).

An interdiction or the appointment of a counsel shall take effect from the day of the judgment. All acts performed subsequently by the interdicted person, or without the assistance of a counsel, shall be void by right (Art. 502).

Acts previous to the interdiction can be annulled if the cause of the interdiction notoriously existed at the time these acts were performed (Art. 503).

After the death of an individual the acts performed by him can only be attacked on account of insanity, if his interdiction had been pronounced or applied for before his death, unless the proof of insanity results from the very act which is attacked (Art. 504).

A husband is by right the guardian of his interdicted wife (Art. 506).

An interdicted person is assimilated to a minor as to his person and as to his property. The laws on minors shall apply to the guardianship of interdicted persons (Art. 509).

The income of an interdicted person must be specially used to better his condition and hasten his recovery. The family council may direct that he be taken care of at his residence, or be placed in an asylum, or even in a hospital, according to the symptoms of his disease and the amount of his fortune (Art. 510).

Interdiction ceases with the causes which have given rise to it. Nevertheless, the withdrawal thereof shall only be obtained by following the rules set down to obtain an interdiction; and the interdicted person can only resume the use of his rights after a judgment ordering the withdrawal of such interdiction (Art. 512).[1]

The French Asylum System.

I. **Introductory Remarks: Definition of "Aliéné."**—A person whose reason is weakened or distraught (*pervertie*) to such a point that his enjoyment of personal liberty becomes a source of constant danger, either to the public, to himself, or to his fortune, is called an *aliéné*.

Origin of Existing Legislation.—The dispositions of the code leave a blank, which has been filled by the law of June 30th, 1838. To apply for an order for interdiction was often very repugnant to families, both on account of the publicity which it involved and the fear of increasing the malady of the lunatic, if the latter found out that such proceedings had been commenced.

[1] *Cf.* the above, with the provisions in Scots law, for voluntary and judicial interdiction: Stair i. 6, 37; iii. 8, 37; iv. 20, 30; Bankt. i. 7, 118; Ersk. i. 7, 53; Bell, *Com.* i. 139; *Prin.* s. 2123; Fraser, *P. & C.* 554; *Jurid. Styles* ii. 448; iii. 293. The only English analogue is to be found in the law as to catching bargains and undue influence.

It was preferred therefore rather to place the patient in a home for persons of weak intellect (*maison de santé*) or a lunatic asylum (*maison d'aliénés*); but relatives could not, without violating the principle of personal liberty, conduct an insane person there, or keep him there against his will, since no guarantees existed against possible abuses. Moreover, establishments devoted to the special care of lunatics were rare, and *aliénés* were therefore placed in ordinary hospitals and often even in reformatories or houses of correction!

The law of June 30th, 1838, remedied this state of things; but experience has demonstrated how insufficient its provisions are to guard against possible abuse. Several legislative proposals for the amendment of the French law of lunacy have since 1839 been under consideration, but no actual changes in the law have been made.

II. **Provision, Classification, and Visitation of Asylums.**—Every department is required to have a public establishment specially devoted to the reception and care of lunatics, or must enter into an arrangement with a private establishment or with the establishment belonging to a neighbouring department for the reception and care of its lunatics. The arrangements made with such establishments must be approved by the Minister of the Interior (1838, Tit. I., Art. 1). Similar provisions are contained in s. 269 of the English Lunacy Act [1890], and s. 17 of the English Lunacy Act [1891]. Public and private asylums alike are under the supervision of the public authority (*ibid.*, Arts. 2 and 3), and are to be visited by the prefect and the persons specially selected by him, or by the Minister of the Interior, the president of the court, the Procurator of the Republic, the justices of the peace, or the mayor of the communities. The Procurator of the Republic is to visit at irregular intervals private establishments once at least in three months, and public establishments at least once in six months (*ibid.*, Art. 4). No one may conduct or establish a private asylum without the authority of the Government (*ibid.*, Art. 5). Here we have in operation the same suspicion of the principle of private profit which underlies so much of our own legislation with regard to licensed houses. The conditions on which the license of the Government may be given are defined by the law of December 18th, 1839. The petition, which is addressed to the prefect of the province in which the institution is to be located (1839, Art. 17), must state the following particulars: (1) That the petitioner is of full age and has all the rights of citizenship; has led a moral life (a fact to be attested by a certificate from the mayor of the community in which he has resided for the last three years); and is a doctor of medicine (*ibid.*, Art. 18), or, if not, that he has engaged a physician to look after the medical department of the asylum, whose name must be approved by the prefect, and who may at any time be discharged by the prefect with the approval of the Minister of the Interior (*ibid.*, Art. 19). (2) The number and sex of the patients to be received (details afterwards mentioned in the authorisation

papers) (*ibid.*, Art. 20), and whether insane patients only, or other patients also, are to be received; in the latter case it must be shown in the plan that the insane patients will have separate accommodation (*ibid.*, Art. 21; and see 1838, Tit. I., Art. 5). (3) That the locality is not unhealthy or noisy; that there will be a sufficient supply of good fresh water; that it is possible to separate the sexes, adults from children, and different classes of patients from each other; and that the patients have separate apartments ([1839], Art. 22). (4) That sufficient guarantees have been taken for good order, for the morals of the officers of the establishment, and for the security of the patients (*ibid.*, Arts. 22 and 23). The director of every private asylum is required, before entering on his duties, to find security—the amount of which is determined by the Minister of the Interior (*ibid.*, Art. 24), and which is paid in cash into the treasury of the institution (*ibid.*, Art. 25; and *cf.* Art. 26). A director cannot receive more patients than he is entitled to under his authorisation, except upon a special application, which must show that there is accommodation for the increased number proposed (*ibid.*, Art. 28). The director and the doctor referred to in Art. 19, *supra*, must reside on the premises (*ibid.*, Art. 30). The license may be withdrawn on breach of any of its conditions (*ibid.*, Art. 31).

The same law (December 18th, 1839) contains a number of regulations with regard to the internal administration of public asylums. These are to be under the surveillance of commissions of five members (Tit. I., Art. 1), appointed by the prefect (Art. 2). The functions of these Commissioners bear a strong general resemblance to those of our own Commissioners in Lunacy. The appointment is for five years, but every year one member is replaced by a new one, so that in five years the whole commission consists of new members. The advantage of this constant shifting in these commissions of surveillance is not obvious. The Commissioners may be discharged by the Minister of the Interior only. Every year after the installation of a new member the Commissioners appoint a president and secretary (Art. 2). The actual management of the public asylums is committed to responsible directors (Art. 1) appointed by the Secretary of the Interior on his sole responsibility in the case of first appointments, and in the case of subsequent vacancies from at least three candidates selected by the prefects (Art. 3). The directors can only be discharged by the Minister of the Interior (Art. 3). Similar rules apply to the appointment of physicians to the various asylums (*ibid.*). The Commissioners are to advise as to the management of each asylum (Art. 4). The commission is to meet once a month, but may be called together by the prefect at any time. The directors assist at its sessions, but have only a consultative voice, and are to withdraw whenever the Commissioners proceed to deliberate on the finances of the asylum, or on any matter reported directly to the prefect (Art. 5). All questions of internal administration belong to the director's department, and he is to be resident in the asylum (Art. 7). The chief physician has the

control of the medical service (Art. 8), and is also to be resident (Art. 10). Provision is made, analogous to that by English law, for the reception of insane patients in hospitals. The arrangements are subject to the approval of the Minister of the Interior (Art. 11), and accommodation for at least fifty patients must, in each case, be provided. The principle of "boarding out" has been tried in the Vosges and the Department du Rhône, but apparently with little success.

III. **Commitment of the Insane to Asylums.**—This may be effected

1. *By friends or relatives.*

2. *By public authority.*

1. *Commitment by friends or relatives.*—The director of a public or private asylum may only receive a patient on the following evidence: (1) A written request for admission, stating (*a*) the names, professions, ages, and domiciles of the petitioner and the respondent, and (*b*) the degree of relationship between the parties. The request is to be written and signed by the petitioner, or, if he cannot write, it must be made out by the mayor or commissioner of police, and, except in the case last mentioned, the director must assure himself on his own responsibility of the identity of the person making the request. The guardian of a ward judicially declared irresponsible must furnish a written extract of the sentence of irresponsibility. (2) A physician's certificate of insanity, with a statement of particulars, granted not more than two weeks before reception. The certifying physician must not be attached to the asylum, or related in the first or second degree to the director or owner of the establishment or to the petitioner. "Urgency" cases may be received without any medical certificate. (3) The passport or any other paper stating the individuality of the person to be received (Law of June 30th, 1838, Art. 8). The reception is to be notified to the prefect, with full particulars, within twenty-four hours (*ibid.*). In the case of a patient received into a private establishment, the prefect, within three days after such notification, is to send one or more specialists to report on the alleged lunatic's mental condition (Art. 9), and (a provision that applies as well to public as to private asylums) report the name, profession, and domicile of the patient to the Procurator of the Republic, both for the province of domicile and for the province in which the establishment is situated (Art. 10). Two weeks after reception the physician makes out a certificate confirming or rectifying, as the case may be, the observations contained in the original certificate and indicating the more or less frequent recurrence of attacks of insanity (Art. 11). There are regulations as to register books similar to our own (Art. 12). Provision is made for discharge on cure (Art. 13) or on demand by (*a*) the curator of the lunatic; (*b*) the husband or wife; (*c*) if neither husband nor wife exist, relations in the ascending, or, in default of these, the descending line (in case of dissensions among relations, the family council decides); (*d*) the petitioner, unless a parent declares that he is acting without consent of the family

council (Art. 14). Precautions are taken, however, against the misuse of this facility. The mayor, on a certificate by the physician of the establishment that the mental state of the patient would "compromise the public peace or personal security," may issue a provisional prohibitory order against his discharge. This order expires in two weeks unless the prefect (as he may do) continues it (Arts. 14 and 21). In case of irresponsibility, judicially declared, only a guardian can demand dismissal, and the patient is to be remitted to his hands alone (Arts. 14 and 21). Discharges are to be notified, in the same way as admissions, to the prefects (Art. 15). Discharge may also be effected on application by the patient or the petitioner for the committal, etc., to the court of the place where the asylum is situated (Arts. 29 and 30). This procedure corresponds roughly to *habeas corpus*.

2. *Commitment by public authority.*—Elaborate provision is made for the committal of dangerous lunatics to asylums by the Chief of Police in Paris and the prefects in the provinces (Arts. 18 and 24.)

Expenses.—The prefect pays the expenses of commitment by public authority, and regulates the charges for the maintenance of persons placed in the hospitals or public asylums. The charges for the maintenance of persons placed by the province in private establishments are fixed by agreement (Art. 26). The expenses referred to in Art. 26 are charged in the first instance to the patients: in default, to the persons liable to pay assessments under the Civil Code. Differences as to liability to pay such assessments are decided by the court on the application of the administrator by whom the collection of the sums due is controlled (Art. 27; and see Art. 28 as to where resources are insufficient or none exist).

The French law contains provisions similar to the English with regard to the correspondence of patients and with regard to securing for them recreation, exercise, and religious privileges.

IV. **Dealings with Property of Patient.**—In the case of a patient who has no guardian, provisional administrative functions are to be exercised by (i) one of the administrative commissioners of public asylums or hospitals appointed by that body for the purpose; he may recover sums due to the lunatic, pay his debts, and, with the special authority of the president of the civil court, sell his goods and chattels (Art. 31): (ii) a provisional administrator appointed by the civil court of the council, on the application of the parents or husband or wife of the patient, or the administrative commissioners or the Procurator of the Republic. The appointment is to be made only after deliberation in the family council, and from its decision there is no appeal (Art. 32; see further, Arts. 34 and 35). The court may appoint the provisional administrator special attorney to represent the patient in any legal proceedings pending at the time of, and commenced after, his commitment, or, in cases of urgency, to commence litigation on his behalf (Art. 33). Where there is no provisional administrator, a notary may be appointed to represent the patient in his legal affairs (Art. 36).

The powers of provisional administration expire on the discharge of the patient (Art. 37). It should be noted that this is different from the practice under s. 116 (1) (c) of the Lunacy Act [1890]. An order made under that clause does not come to an end by the mere fact of the person to whom it applies ceasing to be under detention. An order is required for the discharge of the lunatic from the lunacy jurisdiction, and it will not be made unless the court is satisfied that the delusions, for instance, from which the lunatic was suffering have ceased to exist (*In re B.A.S.* [1898], 78 L.T. 638). The reason for this difference would seem to be that the French arrangements above described are primarily rather a department of asylum administration than a judicial system.

On the request of a parent, or of the husband or wife or a friend of a patient (who has no guardian), or of the Procurator of the Republic, the court may appoint a curator as well as a provisional administrator. The curator is to see that the revenues of the patient are employed for his benefit and that he is reinstated in his rights as soon as his mental condition renders it possible. No presumptive heir of a patient may be chosen curator (Art. 38).

III.—THE UNITED STATES.

In the American lunacy laws the principle that "the insane are the wards of the State" is recognised in theory, but only to a limited extent in practice. The Government of the United States provides only for the insane of the army and navy and for those residing in the district of Columbia. Congress has enacted no lunacy code, and its legislation on the subject is confined to the creation of "The Washington Hospital for the Insane" (Code of 1881, ss. 2247, *et seq.*); and while the different states of the Union have each their own lunacy legislation, the work of the State in this direction is largely supplemented by (i) county and municipal institutions, (ii) incorporated hospitals and asylums (created and administered in some instances by religious orders), and (iii) private asylums.

Owing to the lack of uniformity in the lunacy laws of the United States, it is not possible to present anything like an even fairly complete view of their leading features here. But it may be serviceable to attempt a brief statement of the solutions which they severally offer to a few typical problems in lunacy administration.

Reception of the Insane.—Here at least three different methods of operation are in force. In a majority of the states, commitment is effected on medical certificate by one (Tennessee, Act of 1871, c. 138, s. 3) or two (Penn., Act of 1883, s. 19) physicians, sworn to or affirmed before a judge or magistrate, or a certificate of a judge made on petition, supported by a medical affidavit (Texas, Act of 1883, c. 18, s. 93). Both in its general character and in its details, this procedure closely resembles commitment under reception orders in England.

In several states the verdict of a jury finding lunacy is a necessary preliminary to the commitment of private patients (Kentucky, Act of 1883, c. 900, s. 14; Maryland, R.C. [1878], Art. 53, s. 21; Illinois, R.S. [1874], c. 85, s. 22). The proceedings on these inquests very closely resemble those on English inquisitions, *de lunatico inquirendo*. In others a Board of Commissioners is appointed in each county, with powers to determine questions of commitment (Dakota, Act of 1879, c. 23, s. 16; Iowa, McLain's *Annot. Stats.* [1888], s. 2189). In some states these methods slightly overlap. In nearly all the American states there are powers similar to those provided by the English Lunacy Acts for dealing with pauper lunatics and with urgent and dangerous cases.

Discharge.—The discharge of patients may be effected (i) by the superintendent of the place of detention on recovery (Connecticut, *Gen. Stats., Rev.*, 18 Tit. 67, c. 98, s. 9; Dakota, Act of 1879, c. 23, s. 37), with notice to Commissioners of Insanity (*ibid.*, s. 38) or to clerk of circuit court (Indiana, *Rev. Stats.* [1894], s. 3284); (ii) by the Commissioners of Insanity (Iowa, McLain's *Annot. Stats.* [1888], ss. 2207–10) or trustees (New Hamp., *Pub. Stats.* [1891], c. 10, s. 27); (iii) in cases of illegal detention by a judge on report of a commission of not less than three—one legal and one medical member at least (Iowa, *ubi sup.*, s. 2245); as to penalty for illegal detention (*Rev. Stats.* [1889], vol. iii., p. 2157), or on *habeas corpus* (Iowa, *ubi sup.*, s. 2247). Provision is frequently made for the discharge, under a judge's order, of "probably incurable" or "chronic" cases to make room for new patients (Arkansas, *Stats.* [1894], s. 4007), and also that a patient shall not be discharged without clothing and money enough to carry him to his residence being supplied to him (Alabama, Code Civil [1886], s. 1249; Georgia, Code Civil [1882], s. 1363).

Method of Bringing Property under Control.—This branch of the subject may be dealt with shortly. The fundamental procedure is an inquisition conducted on practically the same lines as in England (*cf.* Indiana, *Rev. Stats.* [1894], ss. 2715, *et seq.*; Missouri, *Annot. Code* [1892], ss. 2835, *et seq.*; New Mex., *Gen. Laws* [1880], c. 74, ss. 1, *et seq.*). The law of New Mexico bears the closest resemblance to that of England as regards not only inquisitions, but traverse, and the powers and duties of committees in relation to a lunatic's property. In this connection it may be noted that by s. 14 of the New Mexican law the district court of any county may, in the case of a lunatic residing out of the jurisdiction, and duly found to be a lunatic according to the laws of the place in which he resides, admit copies of the proceedings, duly authenticated, "as sufficient proof for the appointment of a committee of the person or estate of such person" within its jurisdiction). Committees appointed in pursuance of a finding of lunacy occupy a similar position to that of committees under English law, and the property of the lunatic "vests" in them in a similar sense.

There does not appear to be in the United States such a summary procedure as was created by s. 116 of the Lunacy Act [1890].

Asylum Administration.—The main features of American and English asylum administration—*e.g.*, as regards visitation, patients' correspondence, regimen, etc.—are similar in substance, and do not admit of a profitable comparison.

Lunatics and the Criminal Law.

(*a*) **Asylums for the Criminal Insane.**—The question of the legal responsibility of the insane is not here considered. In New York and in Michigan (Harrison, *Legislation on Insanity*, s. 198 ; *Annot. Stats.* [1883-90], s. 1943) there are criminal lunatic asylums. Elsewhere, insane criminals are detained in State asylums or hospitals, or prisons. The statutory rules as to the maintenance of criminal lunatic asylums and as to the treatment of the criminal insane are similar to our own.

(*b*) **Plea of Insanity in Criminal Courts.**—The development of American law on this point has followed the same course as our own. The common law jurisdiction of the superior criminal courts to determine the fact of insanity was undoubted. But there was some uncertainty, as in England, with reference to the power to order the detention of a prisoner acquitted on the ground of insanity. And so our own Criminal Lunatics Act [1800], (39 & 40 Geo. III., c. 94), giving such power, and providing for the determination both of insanity *on arraignment* as a preliminary issue, and of alleged insanity at the time of the commission of the offence (the jury being here often required to find the facts of insanity specially), was substantially reproduced in many of the states (see Arkansas, *Pub. Stats.* [1894], s. 2124 ; California, *Deering's Codes*, ss. 1150 and 1370 ; Iowa, McLain's *Annot. Stats.* [1888], s. 6018 : here counsel for defendant begins [*ibid*, s. 6020] ; note that in this state provision is also made (*ubi sup.*, s. 2211) for the commitment of an insane prisoner before indictment by summary procedure resembling our own under a Secretary of State's warrant (Illinois, *Annot. Stats.* [1885], s. 485 ; Missouri, *Rev. Stats.* [1889], s. 4141 ; New Jersey, Revision of 1877, p. 625, s. 110 ; New York, *Rev. Stats.* [1889], vol. iii., p. 2160 [special plea required]).

IV.—MISCELLANEOUS.

Little can be said here of the lunacy laws of the principal *British colonies*. The Canadian are largely a reproduction of the English lunacy law under the Lunatic Asylums and Lunacy Regulation Acts of 1853. The Australian also bear a close resemblance to the English, with variations suited to colonial conditions and necessities. Reference may be made to the two cases above noted, of *In re Barlow's Will* (New South Wales), and *In re Brown* (Victoria).

The chief interest in connection with *Belgian* lunacy administration arises from the successful working of the family system of making provision for the insane at Gheel. The patients, after a few days' preliminary observation, are placed in families, and except that they are under ultimate official control by a *superior commission* composed of the governor of the province, the *Procureur du Roi*, and others, enjoy complete liberty indoors as well as out of doors. The patients are visited by nurses from the infirmary, to which they may be sent if they become seriously ill or unmanageable. They are encouraged to work. The accommodation to be provided for them is prescribed, and is to be of the same quality as that of the household in which they live. Clothing is provided by the administration. This is the most successful application in existence of the system of boarding out.

The typical *German* lunacy system closely resembles the French. We have similar restrictions on the establishment of private asylums and similar rules as to administration and internal economy, the admission and discharge of patients, questions of maintenance and treatment, and the relationship as regards the insane between the administrative authorities and the civil courts.

An example of the judicial arrangements for the care of the insane in Germany is the Bavarian. The absence hitherto of any general lunacy law for the German Empire has had, with many obvious disadvantages, one great merit: it has secured free play for a variety of experiments in administrative matters and for the accumulation of a large body of scientific results before any attempt at rigid uniformity should be made.

I am indebted for a valuable note (of which the following is a translation) on German lunacy law to the kindness of Professor Heinrich Harburger, of Munich:—

"The legal position of the insane in the department of civil rights is still regulated till January 1st, 1900, by the various legislatures of the several states of which the German Empire consists. From and after January 1st, 1900, the Civil Code, as is well known, will be in force. SS. 6, 104, 105, 114, 1896, and 1906 of that code deal with the insane. By s. 6 one who, in consequence of lunacy (whether congenital or supervening) or of mental weakness, is incapable of managing his affairs may be subjected to guardianship. But the proceedings for this guardianship, of course, only ensue on the attainment of full age—that is, according to s. 2, on the completion of the twenty-first year. By s. 104 a person is incapable of managing his affairs, and also disqualified from at any time instituting legal proceedings with effect, who is in a condition of disordered mental activity, excluding the free exercise of the will, unless the disorder is only a temporary one, and, still more so, who is placed under guardianship on account of mental disease. The testament or contract of one who is *non compos mentis* is by s. 105 invalid; any legal proceeding made in a state of unconsciousness or

temporary disturbance of the mental powers would also be set aside. One who, on account of mental weakness, is placed under guardianship, from the point of view of incapacity, is exactly like a minor who has completed his seventh year (s. 114)—that is to say, he requires for a will, through which he does not solely gain a legal advantage, the consent of his lawful guardian (s. 107). The validity of a contract into which he enters without that consent depends on the same condition (s. 108); a unilateral contract which he makes without the above-mentioned consent is ineffectual (s. 111). He cannot draw up a will (s. 2229), but he can revoke a will formerly made (s. 2253). On the other hand, he possesses unlimited capacity for such arrangements as he, after the lawful guardian has authorised him to enter into contract as to service or work, makes in regard to the entry on, or abandonment of, service or work of the permitted kind, or the fulfilment of the obligations resulting therefrom (s. 113).

"A person of full age, who has been placed under guardianship, has a curator as his legal guardian (s. 1896). A major, for whose subjection to curatory a motion is made, can be placed under *interim* curatory if the judicial authority think it necessary for the prevention of serious danger to his person or property (s. 1906). A person under *interim* curatory is, in regard to capacity, in precisely the same position as a minor who has completed the seventh year of his age (s. 114).

"With reference to civil proceedings, the following provision is important. By s. 52 of the Civil Procedure rules, as modified by the law of May 1st, 1898, a person is capable of instituting legal proceedings, if he can, according to the common law, bind himself contractually.

"The proceedings for testing the insanity or mental weakness are regulated by ss. 645 to 679. The application can be made by spouses, by a relative, by the lawful guardian proposed for the person alleged to be insane, and, further, by the Public Prosecutor to the Landgericht. The proceedings are in the first instance instituted in the Court of the Amtsrichter. The practice of this tribunal is to enter into a personal examination of the alleged lunatic in presence of one or more competent experts, and to receive other evidence as to his mental condition. It can, in particular, sequester him up to six weeks in a medical establishment, if this seems necessary to experts judging of his state of health. The decision of the court on the question of curatory can be attacked in an action by the insane person himself, by his lawful guardian, as well as by the persons otherwise entitled to apply for curatory, and also by the Public Prosecutor. The procedure is substantially identical with that prescribed in other civil proceedings.

"If the insane person again become mentally sound, the supersedeas of the curatory can be applied for by himself, his legal guardian, or the Public Prosecutor. Here again the decision rests with the Court of the Amtsrichter. If the application is refused by the Amtsrichter, an action can, as before, be instituted, and the case will be decided by means of it.

"In penal law, prohibited acts are not punishable if the person doing them is, at the time of their commission, in a state of diseased disorder of his mental powers, through which a free exercise of his will is excluded (Penal Code, s. 51). The question whether such a mental condition exists is for the judge to decide on the opinion of competent experts. In cases which are tried by jury, the jury have to decide it (Code of Penal Procedure, s. 293). With a view to the preparation of such a report on the mental condition of an accused person, the court can, on an application by the experts, made after hearing the counsel of the accused person, order him to be taken to a public asylum, and there subjected to observation. Against this decision an immediate appeal, which has the effect of postponing the proceedings, is permitted. The period of detention in the asylum is not to exceed six weeks' duration (*ibid.*, s. 81). If in the course of the preliminary proceedings or enquiry it becomes clear that the accused is insane, the preliminary procedure is arrested till his recovery; if he was already insane at the time of the commission of the act, so soon as the fact is manifest the whole proceeding has to be given up (*ibid.*, ss. 202, 203).

"If a person undergoing punishment becomes insane, the execution of the sentence is inadmissible till his recovery (*ibid.*, ss. 485, 487).

"With regard to the civil responsibility of an insane person, s. 827 of the Civil Code provides that such a person is not responsible for injuries done to any one.

"One who by law or contract is charged with the oversight of an insane person is liable for damage illegally done by him to a third party, if it appear that he was lazy in his oversight or that the injury would have been prevented by proper care (*ibid.*, s. 832). If compensation for injury occasioned by the lunatic to third persons cannot be reached in this way, it may be obtained from the lunatic himself to a reasonable extent and so long as it does not deprive him of the maintenance suitable to his rank and of the means of fulfilling his legal obligations as to maintenance (*ibid.*, s. 829).

"Germany does not possess a general law with regard to the treatment of the insane; in particular, the rules as to the conditions of the reception of an insane person into an asylum depend on the laws of the several states. It is generally thought desirable that an official medical opinion (which must be founded on personal examination) should first be obtained that the alleged insanity exists. Dangerous lunatics can, on an official expert certification of their insanity, also be placed in an asylum at the instance of the head of police. The responsibility for the erection of public asylums rests with the smaller or larger municipalities. The establishment of private asylums is throughout the whole of United Germany subjected to the condition that, as the imperial law for the regulation of industry (s. 30) prescribes, a permit from the State magistrate is necessary. Such a permit is to be denied (1) on account of the unreliability of the

applicant with regard to the management and direction of the asylum; (2) if in the descriptions and plans furnished by the applicant the building and other dispositions in regard to the asylum do not correspond to the police sanitary regulations; (3) if the asylum may cause serious loss or danger, owing to its being carried on, to other inmates of the same building or, through its local situation, to the owners or occupiers of neighbouring estates.

"The supervision of private asylums, on the contrary, is regulated by the laws of the several states. For the most part these laws direct that unexpected visits by the official medical men, combined with an examination of the patients, should frequently be made; and, further, that within twenty-four hours after the admission or discharge of a patient, notice should be given to the official medical man of the fact.

"Lastly, I must not omit to add that the Civil Code (s. 1569) recognises the lunacy of a spouse as a ground of divorce, but only where the malady continues during at least three years of the union, and has reached such a pitch that intellectual intercourse between the spouses is impossible, and also that every prospect of a restoration of such association is excluded. If one of the spouses obtains a divorce on the ground of the lunacy of the other, the first has to allow alimony, just as a husband declared to be the sole guilty party in a divorce suit would have to do (ss. 1585, 1578)."

V.—CONCLUDING OBSERVATIONS.

It only remains to sum up the general results of the foregoing enquiry.

1. A great similarity is noticeable in the comparative law of lunacy in matters of asylum administration. In proof of this statement, reference may be made to the provisions in regard to reception, temporary confinement, conditional and absolute discharge, correspondence of patients, visitation, visits of friends.

This similarity is partly due, no doubt, to the fact that civilised nations brought face to face with the same administrative problems will naturally light upon similar solutions of them. But its origin is mainly attributable to historical causes.

The typical modern asylum system is the product of the great movement for reform in the accepted methods of treating lunatics which, associated in England with the name of William Tuke, in France with the names of Pinel and his disciples, and in America with that of Ray, swept almost simultaneously over both the old world and the new at the end of the eighteenth and during the first half of the nineteenth century. The points of contact between the lunacy laws of modern Europe and America are the heads of the reformation which that movement demanded and accomplished. This aspect of the subject cannot be further elaborated here. The leading authorities are Hack Tuke's *Insane in the British Isles*, Semelaigne's *Les*

Grands Aliénistes Français, and the works of Pinel, Esquirol, Marc, Georget, and Ray.

There are many minor resemblances in details, such as between the English urgency order and the Scotch emergency certificate, the various arrangements for boarding out, etc.; most of these, however, have been noted incidentally above.

Practically the chief outstanding problems of lunacy administration are: (i) how to secure the treatment of insanity in its incipient stages,—and here there is room for more adequate protection being afforded to medical men granting certificates of insanity than some lunacy systems, and perhaps even than our own confers, and also for greater encouragement being given to nervous and hysterical patients to place themselves under medical care by enabling them to take this step without, as under s. 315 (1) of the English Lunacy Act [1890], being brought under the jurisdiction of Lunacy Commissioners or similar bodies;—and (ii) how to get a better classification of patients, according to their various ailments, than exists at present.

2. As regards judicial matters, we find that wherever the common law or the early statute law (which was in England probably declaratory only of the common law) has had sway or influence, the inquisition, with its accompaniments of traverse and commitment of the person and estate, prevails. This is notably the case with the United States. But the observation holds good to some extent with Scotland also, in which country the law of England exercised great influence till Scots law was recast on the Roman model, originally through the instrumentality of the "Ancient League" and latterly through Dutch channels. On the other hand, where the Roman law is paramount, as in France, and afterwards in Scotland, the simple procedure of curatory is introduced. In England we have an admirable application of this system in the summary powers created by the Lunacy Act [1890], s. 116.

3. While it is not proposed to enter in this article on questions relating to the substantive law of lunacy, it may be interesting to point out briefly the support which its course of development lends to the explanation suggested in paragraph 1, *supra*, of the similarity noticeable in the comparative law of lunacy in matters of asylum administration. Although the reform initiated by Tuke and Pinel was largely an administrative one, it had important, although indirect, juridical consequences. One of its principal features was an insistence upon the fact that, contrary to current popular and even scientific conceptions, insanity, striking at the root at once of legal capacity and of legal responsibility, might co-exist with considerable powers of self-restraint and with apparently undimmed intellectual faculties, and that it might even manifest its presence in the affections alone. The obvious tendency of this theory was to make the question, "Is the man insane?" the criterion to be applied when either the civil capacity or the criminal liability of a person alleged to be suffering

from mental disease was in issue. And this test was in fact generally adopted, although with curious national and temporary variations. In France, and in continental countries as a whole, there was a marked avoidance of any attempt to frame rigid definitions of the insanity which would "vitiate all acts"; and this position has, with very fair consistency, been maintained. In England a similar attitude was preserved as regards insanity in its civil relations for about a quarter of a century after the reform movement had reached its height. We find, for instance, that from 1848 to 1870 the law as to the testamentary capacity of insane persons nominally [1] was that, the mind being one and indivisible, the least degree of insanity was fatal to the power to make a will. The same doctrine exercised for a considerable period equal influence on the law as to the capacity of the insane to marry (cf. *Hancock* v. *Peaty* [1867], L.R. 1 P. & D., at p. 351). It appears at an earlier stage, though well within the time limits of the reform movement, in America. From the postulate, however, that courts cannot measure the understanding of a testator, the American judges drew a conclusion precisely opposite to that drawn by Lord Brougham and Sir J. P. Wilde—viz., that if a man has any reason at all and is not an absolute idiot, he is the lawful disposer of his own property (*Stewart* v. *Lispenard* [1841], 26 Wendell 255).

Meanwhile, another aspect of the same idea had been turning the course of the law of criminal responsibility, both in England and in America, into a contrary channel, and one which was destined to subvert in time Lord Brougham's metaphysical theory as to the effect of insanity on civil capacity. Pinel and his school had, as we have seen, established the existence (for our present purpose all questions as to the scientific accuracy of the term are irrelevant) of partial insanity. The result of this discovery was to make French medico-legal experts shrink from definitions dealing with questions of degree in the region both of civil and of criminal law. In England and America this policy was, in the matter of criminal responsibility, practically impossible. On points of civil capacity the law of both countries had, at the time when the new conception presented itself to them, no rigid criteria to hamper them. It was otherwise, however, with the law as to criminal responsibility. Both in England, and to some extent in America, there was then in force a rule, laid down in this country by Sir James Mansfield in the trial which ended in the conviction of Bellingham in 1812, according to which the criminal responsibility of the insane was made to depend on their capacity to distinguish between good and evil. If, however, such a disease as partial insanity existed, this standard was not defensible,

[1] *Waring* v. *Waring* [1848], 6 Mo. P.C. 341, was rightly decided on the evidence, whatever may be thought of the doctrine stated in the text which was propounded by Lord Brougham. The same observation applies to *Smith* v. *Tebbitts* [1867], L.R. 1 P. & D. 398, and *Hancock* v. *Peaty* (a case of marriage) [1867], L.R. 1 P. & D., at p. 351, where Sir J. P. Wilde adopted Lord Brougham's dictum.

for it followed that there might be lunatics whose abstract notions of right and wrong were entirely correct, and who were yet prevented by mental disease from perceiving the wrongness of particular acts. Under these circumstances further definition was inevitable, and so knowledge of the nature and quality of the particular offence alleged was made the test of criminal responsibility by the rules in MacNaughton's case ([1843], 4 St. Tr. N.S., 847), which were rapidly reproduced in America (cf. *State* v. *Spencer* [1846], 1 Zab. 196; *Willis* v. *People* [1870], 33 N.Y. 715; *U.S.* v. *Holmes* [1858], 1 Clif. 98; *U.S.* v. *Shults* [1854], 6 Mack 121; *People* v. *Hobson* [1861], 17 Cal. 424; *per contra*, however, *Commonwealth* v. *Rogers* [1844], 7 Met. Mass. 500; *People* v. *Klein* [1845], 1 Edm. Sel. Ca., pp. 22-35). The emphasis assigned to the doctrine of "partial insanity" in criminal law eventually overthrew, both in America (*Delafield* v. *Parish* [1862], 25 N.Y. 1) and in England (*Banks* v. *Goodfellow* [1870], L.R. 5 Q.B. 549; *Ballantine* v. *Evans* [1886], 13 Ct. of Sess., 4th ser., 666; and cf. *Durham* v. *Durham* [1885], 10 P.D., at p. 82, a case of marriage; and *Jenkins* v. *Morris* [1880], 14 Ch. D., 674), the metaphysical theory as to the inconsistency between any degree of insanity and civil capacity.

It may be added that the United States and England have alike modified their attitude to MacNaughton's case. The modern trend of American judicial opinion is distinctly adverse to the rules (*cf.* the masterly opinion of Judge Somerville in *Parsons* v. *State* [1887], 81 Ala. 577; *Hopps* v. *People* [1863], 31 Ill. 385; *Brown* v. *Commonwealth* [1875], 78 Pa. St. 122), while in England there is a growing tendency, at *nisi prius*, to manipulate them so as to afford protection to the more marked cases of moral insanity. As instances of this tendency, reference may be made to *Reg.* v. *Davies* [1888], (*Western Mail*, March 15th, 1888); *Reg.* v. *Burt* [1885] (*Norfolk Chronicle and Gazette*, November 10th, 1885); *Duncan's* case, Wood Renton on *Lunacy*, at p. 901; *Reg.* v. *Leggatt* [1897] (Dundee Circuit Court, *Jo. of Ment. Sc.*, vol. 43, N.S. 420). On the other hand, the rules are sometimes rigidly adhered to (see charge of Day, J., in *Reg.* v. *Allcock* [1896], Notts. Ass., *Jo. of Ment. Sc.*, *ubi sup.*, 421).

The subject cannot be further pursued here. Enough perhaps has been said to accomplish the purpose with which the above observations have been made.

OCCUPATION AND *RES NULLIUS.*

[*Contributed by* JOHN MACDONELL, ESQ., C.B., LL.D.]

IN recent times have been many international controversies in which occupation of territory, the conditions and consequences of it, and (what is part of the same subject) the nature of *res nullius* have been considered. In these discussions appears great diversity of opinion even as to principles. Obsolete theories are still put forward; legal fictions are repeated as if they were facts; and the reasons which now actually determine the results of such controversies are often disguised in the language of discarded theories. No doubt a succession of international arbitrations relating to disputed boundaries and territories is gradually clearing up doctrines which writers on international law had left obscure or imperfect. No doubt, too, the Berlin Conference of 1885, the discussion to which it gives rise, and the labours of the Institut de Droit International (which has several times had the question before it) have helped to elucidate the subject. But every international arbitration involving territorial claims or questions of boundary reveals confusion and uncertainty in thought and language.

Three or four different theories on this subject are at present in the field. They are inconsistent; they originated in different ages; but in international arbitrations they are still put forward as if they were all equally valid. According to the first of these theories, discovery was held to give a title to countries inhabited by uncivilised nations. It was part of the common law of Europe that territories occupied by pagans belonged to the Christian nations which discovered them, at all events if there was a notification of intention to acquire.[1] Then came a period in which nations preferred to derive their title to sovereignty over new countries from "occupation," which might be partial or fictitious; occupation, as it was said, merely *oculis et affectu.* The acts relied upon might be the hoisting of a flag, the erection of a mound or cross, the firing of a salute, the purchase of a treaty in exchange for rum, beads, or knick-knacks from a chief who professed to sell what he did not always own. In every dispute as to boundaries or territory, these two theories are still brought forward, and in the majority of books the latter, in some form or other, is still the dominant theory. And yet there is reason to think that it is a continuation of the confusion between sovereignty and property to be met with very often in the

[1] The history of this period is admirably described in Salomon's *L'Occupation des Territoires sans Maitres.*

literature of international law. In the controversies as to the Caroline Islands, the Island of Bulama, Angra Pequena, Delagoa Bay, the Venezuelan boundary question, and Fashoda, fallacies originating in this confusion abound. It was natural enough in feudal times; the boundary between rights of dominion and ownership was then hard to draw.[1] Expelled from municipal law, the confusion is still a snare to publicists arguing about the title to disputed territory. As has been truly said, "this fallacy has found its last refuge in international law." To insist that discussions of what are really questions of sovereignty should, as far as possible, be cleared of references to "occupation" and be carried on in language applicable to the former is as important as it ever was.[2]

How occupation came to have the prominent place in those controversies which it has acquired is to be chiefly traced to the influence of Roman law. Early writers on international law assumed that the rules of private law could be applied to the transactions of States, and that such rules were sufficient to cover the field of international relations. For them international law was Roman law writ large. This assumption had its advantages. The discussion proceeded along clear lines. Instructive analogies were suggested. There are ideas and rules common to both international and private law. Many of the principles regulating contracts or torts are equally applicable whether States or private persons are concerned. In many matters the State is in truth the individual writ large. Sometimes the analogy is still pressed with little reservation as to its accuracy. Mr. Jezé, the author of an excellent work on "Occupation," remarks:

"La définition de l'*animus domini* en droit public est analogue. Il nous suffit pour l'obtenir de remplacer le mot proprieté par celui de souveraineté."

A substitution often made, and rarely, it is submitted, without introducing confusion.

In how many ways this theory, which identifies property with sovereignty, has diverted attention from the real issues to be determined cannot be here shown. But one or two illustrations of the insufficiency of doctrines of Roman law as to possession or occupation to answer what are in truth questions as to sovereignty may be given. It was a principle of Roman law that possession once obtained might be retained if there was the intention to retain. In the Code (7, 32, 4) we read:

"Licet possessio nudo animo acquiri non possit, tamen solo animo retineri potest. Si ergo prædiorum desertam possessionem non derelinquendi affectione

[1] "Just in so far as the ideal of feudalism is perfectly realised, all that we call public law is merged in private law. Jurisdiction is property, office is property, the kingship itself is property. The same word *dominium* has to stand now for ownership and now for property" (Maitland and Pollock, *History of English Law* 1, 230).

[2] The Portuguese "case" in the Delagoa Bay Arbitration was permeated by this confusion between sovereignty and property. (See, for example, p. 83; *Parliamentary Papers*, 1884 [c. 4262], 61, 71).

transacto tempore non coluisti, sed metus necessitate culturam corum distulisti, præjudicium tibi ex transmissi temporis injuria generari non potest."

In the Portuguese "case," with respect to Delagoa Bay, such texts as the above were cited in favour of a title practically unsupported by recent acts or exercise of authority. What applicability is there in this doctrine to questions of sovereignty? Few nations would consent to recognise the claims of another to a large tract or region based on the plea that the latter had ages ago occupied it and had never given up the intention of re-occupying it, though in fact it had long exercised no control. It would be said, "We must look to present facts and see who is actual master; we respect not paper claims to sovereignty, but the outward and visible signs of it." It was a principle of Roman law that possession of a part which was not severable from the rest of the property was possession of the whole:

"Quod autem diximus, et corpore et animo acquirere nos debere possessionem, non utique ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet, sed sufficit quamlibet partem ejus fundi introire, dum mente et cogitatione hac sit, uti totum fundum usque ad terminum velit possidere" (*Digest* 21, 2, 3).

This was a principle reasonable enough as applied to a field, a farm, or a garden, but unreasonable if applied to the sovereignty of a continent or a country. He who occupies one part of a well-defined field can in a moment pass to another part; he can shut out intruders; and he can when he pleases exercise acts of ownership over the whole. But the presence of a Government at one point of a territory, the existence of a fort or a custom house, is compatible with the independence of the inhabitants elsewhere. And yet the above text has always been cited to justify annexation when it was convenient to do so.

For obvious reasons most systems of private law recognise a period of time after which titles to property are unquestionable. The considerations which justify rules as to prescription do not apply, or apply with diminished force, to the acquisition of sovereignty. It is possible in private matters to fix a period of prescription which, having regard to the duration of life or the ordinary course of affairs, is generally reasonable. Can we say the same of States which last indefinitely? Each case depends on its circumstances; and generally the chief facts to be reckoned with are not to be estimated by any juridical rules. Grotius long ago stated some of the reasons which had been given why *usucapio* was inapplicable to loss or acquisition of sovereignty. Lord Salisbury puts the point with his usual force:

"There are essential differences between individual and national rights to land which make it almost impossible to apply the well-known laws of real property to a territorial dispute. Whatever the primary origin of his rights, the national owner, like the individual owner, relies usually on effective control by himself or through his predecessor in title, for a sufficient length of time. But in the case of a nation, what is a sufficient length of time, and in what does effective control consist? In the case of a private individual, the interval adequate to make a valid title is defined by positive law. There is no enactment or usage or accepted doctrine which lays

down the length of time required for international prescription; and no full definition of the degree of control which will confer territorial property on a nation has been attempted. The great nations in both hemispheres claim, and are prepared to defend, their right to vast tracts of territory which they have in no sense occupied, and often have not fully explored. The modern doctrine of "Hinterland," with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control."[1]

The theory of occupation having been introduced into discussions relating to sovereignty; the doctrines of Roman law as to possession being employed to solve questions as to annexation and the like, it was necessary to introduce refined distinctions, and to make many fictitious assumptions in order to fit the theory to the facts: to conceive of occupations by a whole nation as conferring sovereignty, while occupations by individuals did not; to draw distinctions between occupation per *universitatem* and *occupatio per fundos*; between actual and constructive occupation and occupation by reason of contiguity.[2]

Fictions of all sorts were introduced into the discussion; and one of the most common was a supposed occupation by a people or nation as a whole. With few exceptions the writers of last century, influenced by Hobbes, Wolff, and Rousseau, assumed the existence of a state of nature prior to all property; a condition from which men emerged by entering into one or more contracts; a theory which was historically fictitious, but to which, nevertheless, they resorted for the solution of fundamental difficulties. A variety of this theory was the assumption of a general occupation at some indefinite period by one people of the land of another. Grotius starts from a state of nature in which all things were in common, in which every one could take what he liked, and in which property was unknown; and then he proceeds to show how this condition of things ended and property was introduced *pacto quodam aut expresso, ut per divisionem, aut tacito, ut per occupationem*.[3] A favourite assumption was that sovereignty was acquired as an incident to the occupation by "a nation" of a whole territory. An example of this fiction may be taken from Vattel:

"When a nation takes possession of a country to which no prior owner can lay claim, it is considered as acquiring the empire or sovereignty over it at the same time with the dominion."[4]

[1] *Parliamentary Papers*, 1896 [c. 8105], p. 12. Attempts have often been made to establish rules as to *usucapio* and prescription in the case of the acquisition of sovereignty; but those rules merely state vague analogies.

[2] "Duo notanda sunt: duplicem esse occupationem, unam per universitatem, alteram per fundos. Prior solet fieri per populum, aut eum qui populo imperat, altera deinde per singulos" (*De Jure Belli* 2, 2, 4).

[3] *Ibid.* 2, 2, 2.

[4] I., c. 18.

In Puffendorf we meet with the same reasoning as to occupation by the community:

"After men came to a resolution of quitting the primitive community upon the strength of a previous contract, they assigned to each person his share out of the general stock." [1]

Sometimes the theory of a primitive division of land is crudely stated. Mr. Gallatin, the United States plenipotentiary, in describing the view of his country in the controversy with Great Britain respecting the North-eastern frontier, remarked:

"It may be admitted, as an abstract principle, that in the origin of society, first occupancy and cultivation were the foundations of the right of private property and private sovereignty. . . . As in every society it had soon become necessary to make laws regulating the manner in which its members should be permitted to occupy and to acquire vacant land within its acknowledged boundaries, so also nations found it indispensable, for the preservation of peace and for the exercise of distinct jurisdiction, to adopt, particularly after the discovery of America, some general rules, which should determine the question 'who had a right to occupy.'"

A very large part of the literature of the subject is based on a fiction. The actual history of the conquest of new countries is a history of private adventure. Citizens of the great States of the world, sailors, explorers, soldiers of fortune, laid claim in the name of their sovereigns to land which they discovered. The implication, false in fact, in much of the literature of international law is that the "people" of the older States of the world "occupied" new territory.

In recent times the doctrine of occupation is generally modified in order to bring it more nearly into accord with modern ideas. True, the old theories are still appealed to. The "case" or "brief" of each Government in every international arbitration contains a long statement of facts or surmises as to discoveries and minute references to early maps. More and more weight, however, is laid on "effective occupation." As to the coast of Africa, this principle is expressly sanctioned by the Act of the Berlin Conference. Now what is "effective occupation" if not control or the exercise of authority? The use of the phrase probably means no more than there is going on without acknowledgment a transition from the theory of occupation to that of control? [2]

[1] *Kennet's Translation* 4, c. 6, s. 2.

[2] Salomon (*L'Occupation des Territoires sans Maîtres*, p. 30) gives another, and it is conceived, erroneous, signification to effective possession: "Le principe de l'effectivité, c'est à dire, en définitive, l'idée que le travail est en droit international, comme en droit privé, la seule cause légitime d'acquisition d'une terre qui n'appartient à personne, proclamé depuis longtemps par certains jurisconsultes, a été définitivement admis pour une portion du globe seulement, il est vrai, à la conférence de Berlin de 1884 à 1885."

The chief rules laid down on this subject by the Institut de Droit International are as follows:

"L'occupation d'un territoire à titre de souveraineté ne pourra être reconnue comme effective que si elle réunit les conditions suivantes:

"1. La prise de possession d'un territoire enfermé dans certaines limites, faite au nom du Gouvernement.

"2. La notification officielle de la prise de possession."[1]

An obvious criticism on these rules is that possession here means control; that if control is the essential element, it would be well to say so distinctly; that if "occupation" does not mean what it implies, the use of it should be dropped. The next resolution expresses the essential element in these words:

"La prise de possession s'accomplit par l'établissement d'un pouvoir local responsable, pourvu de moyens suffisants pour maintenir l'ordre et pour assurer l'exercise régulier de son autorité dans les limites du territoire occupé."

Occasionally the true point is stated clearly. For example, in the English "case," with respect to Delagoa Bay, it was argued that the erection by the Portuguese of a fort at the mouth of the river Zambesi did not necessarily confer on them sovereignty over the whole district which they claimed:

"As far as the governor of the fortress can and does exercise authority and jurisdiction, so far as the country and its inhabitants are under the control and government of the country to which that fortress belongs, that control and government close at the moment and at the places where the jurisdiction no longer exists, and the authority no longer is, or can be, exercised."

It goes without saying that there may be acquisition of sovereignty without occupation of any but a very small part of a whole territory. The seizure of the capital of a country, the occupation of a commanding position at the mouth of a great river, the possession of the military lines of railway, or the capture of artillery, munitions of war, and arsenals may be sufficient.

Of the other theories on this subject which have been put forward, one may be called the theory of "natural boundaries." It was prominent in the controversy carried on in the early part of the century between Spain and the United States as to the boundaries of Louisiana. In the course of the discussion the American Commissioners enunciated on this subject three rules, which they alleged had been adopted in the practice of European countries, and which were, it was said, founded in reason.

"The first of these is, that when any European nation takes possession of any extent of sea coast, that possession is understood as extending into the interior

[1] *Annuaire* 10, 201.

country, to the sources of the rivers emptying within that coast, to all their branches, and the country they cover, and to give it a right in exclusion to all other countries to the same. It is evident that some rule or principle must govern the rights of European Powers in regard to each other, in all such cases, and it is certain that none can be adopted in those cases to which it applies more reasonable and just than the present one. Many weighty considerations show the propriety of it. Nature seems to have destined a range of territory so described for the same society, to have connected its several parts together by the ties of a common interest, and to have detached them from others.

"If this principle is departed from, it must be by attaching to such discovery and possession a more enlarged or contracted scope of acquisition; but a slight attention to the subject will demonstrate the absurdity of either. The latter would be to restrict the rights of a European Power, who discovered and took possession of a new country, to the spot on which its troops or settlements rested—a doctrine which has been totally disclaimed by all the Powers which have made discoveries and acquired possessions in America. The other extreme would be equally improper; that is, that the nation who made such discovery should, in all cases, be entitled to the whole of the territory so discovered. In the case of an island, whose extent was seen, which might be sailed round and preserved by a few forts, it may apply with justice; but in that of a continent it would be absolutely absurd."

What is all this, it may be asked, but an expression of the doctrine that only territory which has in fact been, or can be, controlled, administered, or governed, is to be understood as "occupied"?

"The second principle is, that whenever one European nation makes a discovery and takes possession of any portion of that continent, and another afterwards does the same at some distance from it, where the territory between them is not determined by the principle above mentioned, the middle distance becomes such of course. The justice and propriety of this rule is too obvious to require illustration.

"A third rule is, that whenever any European nation has thus acquired a right to any portion of territory in that continent, that right can never be diminished or affected by any other Power, by virtue of purchases made, or by grounds of conquest of the natives within the limits thereof."

In the controversy between Great Britain and the United States with respect to the Oregon boundary, the first rule was relied on by the latter country. An American citizen, Mr. Gray, it was alleged, had discovered the mouth of the Columbia River. This fact, it was argued, entitled the United States to claim the whole basin drained by that river. In the "case" presented to the Venezuela Arbitration Commission two rules of law based on the idea of natural boundaries are put forward:

(*a*) "When, either by nature or by the laws of the settlers, a tract has been defined, the rule is that the first occupation of a part is in law an entry upon and possession of the whole. But the entry of a second claimant cannot displace the legal possessor of the first beyond the actual occupation of that second.

(*b*) "Where, between the settlements of two nations, in a country otherwise wild, there are features which form a natural barrier line of demarcation, and which in

a long series of years have not been overpassed or attempted to be overpassed by the actual settlement of either party, the law makes that line the international boundary."[1]

The tests which are suggested in the passages above cited have not been acted upon in later times; the rules suggested by the United States were not followed in settling the Oregon dispute; and obviously they are unreasonable. They point, however, to a theory of natural boundaries which is making way. We may note, in modern times, a tendency to view disputes respecting boundary lines and territory as in substance questions of geography, which are to be settled by a study of the physical conformation of the country.[2] In the arguments on the subject of territorial disputes in the "cases" presented by the Governments concerned, we find the usual evidence as to priority of discovery and occupation of settlers. Rarely is there a frank admission that geographical, economical, social, and racial considerations ought to count for much, and that the endeavour of arbitrators should be, if possible, to discover boundaries corresponding to a physical unity—to make them agree with physical facts. But the practice differs from the theory. Arbitrators are much more alive than they were to the fact that in deciding questions of so-called prior "occupation" they are generally drawing a new boundary line; that it behoves them to fix frontiers in harmony less with the imperfect records of discovery than with the conformation of the country; and that they are engaged, not in discovering a lost boundary line or in filling up gaps therein, but in drawing one for the first time. Stress is more and more laid on social, ethnographical, and geographical facts. The line of demarcation prescribed by the Treaty of San Stefano was fixed with reference to ethnographical facts. Many treaties make the water-shed the boundary line. The *thalweg* is often chosen as the line of separation. Some of these, to be sure, are cases in which a new frontier is avowedly being marked out. But in many—perhaps most—of the recent controversies as to territory, under guise of seeking for a line once recognised, there is an attempt to draw one which will prove most convenient for military, fiscal, and administrative purposes—*i.e.*, *fines arcendis hostibus idoneos*.[3] The theory of natural boundary is reasonable if it means no more than that in case of doubtful boundaries a State must be taken to rule such territory as it can conveniently govern; if it means more than this, it conflicts with the doctrine of effective possession which modern usage recognises.

[1] The authors of the "case" refer to Twiss, c. 8; Phillimore, s. 226.

[2] As an example of the tendency of arbitrators to take into account geographical and commercial conditions, see the award of Baron Lambermont as to the Island of Lamu in 1889, *Nouveau Recueil. Martens*, series 2, p. 101. In Signor Vigliani's award as to the Manica boundary, he rejected the frontier lines proposed by the two Governments, and adopted "a *natural* line, which, in its tortuous course, conforms as far as possible to the mountainous configuration of the plateau, etc." (*Parliamentary Papers*, c. 84, 34, p. 49). See also Mr. Marsh's award as to the Crairola boundary, Moore's *History of International Arbitrations* 2, 20, 27.

[3] See *Grotius* 2, 3, 16.

A complete theory of the subject here touched ought to explain what are, in the view of international law, "spheres or zones of influence," "protectorates," and some other consequences of the modern doctrine of international law that all States are not to be regarded equal. It ought also to explain what is *territorium nullius*. The old way of dealing with this question was to seek analogies in the Roman law of possession or occupation; and the old way is also often the new way. In the dispute as to Fashoda foreign jurists freely drew from the Digest arguments for or against the contention of the English Government. The following is a definition of *res nullius* according to Roman law:

"Nullius vero esse dicuntur res, in quibus vel nemini unquam alios usu istarum excludendi jus fuit, vel de quarum saltim domino nihil cérti constare potest, vel in quibus denique possessor sese ultro jure alios usu earum excludendi abdicavit, quæ pro derelicto habitæ dicuntur."[1]

The Roman jurists had in view such cases as farms abandoned, islands arising in the ocean or in a river bed, wild animals, and derelict property. As to the last, they laid it down that to constitute *res nullius* there must be both abandonment of possession and the intent to abandon; one condition without the other being insufficient. These were tests reasonable enough as applied to property, but they are of little use in considering the view of international law as to regions and countries such as these:

(*a*) Territory totally uninhabited.

(*b*) Territory sparsely occupied by nomadic tribes possessed of no form of government; the condition of Australia before it was colonised by European inhabitants.

(*c*) Territory occupied by tribes uncivilised, but with rude and primitive systems of polity.

(*d*) Territory originally occupied by a civilised nation, but abandoned.

(*e*) A country in which a civilised government has established at certain points remote from each other forts or garrisons, and possesses an imperfect administrative system.

In recent times difficulties have arisen chiefly as to cases (*b*) and (*c*); *i.e.*, as to the position of land inhabited by uncivilised nations.[2] Two views are to be found in the books. According to one, all such territory is to be deemed *res nullius*. As such it may be seized by any civilised State; some writers going so far as to contend that the greater part of Africa was virtually *territorium nullius* before the recent partition by European States. According to another view, no land can be treated as *res nullius* where the rudiments

[1] Heineccius, *Jur. Nat. et Gent.* I, s. 241.

[2] One cannot help noting that in the "case" neither for Great Britain nor for Venezuela is the possibility of the territory claimed by both being *territorium nullius* sufficiently considered. There were similar omissions in the "cases" of Great Britain and Portugal in regard to Delagoa Bay.

of a State are to be formed. On these questions the theory of occupation as applied to derelict private property can throw no light. At the session of the Institut de Droit International, at Lausanne, the following proposal put forward by M. de Martitz was discussed:

"Est considerée comme *territorium nullius* toute region qui ne se trouve pas effectivement sous la souveraineté ou sous le protectorat d'un des États qui forment la communauté du droit des gens, peu importe que cette region soit ou non habitée."

This formula raises as many difficulties as it settles. Of what is composed the *communauté du droit des gens*? Does it include Morocco or Abyssinia? In the discussion of M. de Martitz's proposal M. Viard mentioned the Egbas, an African race with a highly complicated political system, but clearly outside the community of nations as generally understood:

"Ce peuple réunit les conditions que Ciceron définit comme les caractères distinctifs des nations avec lesquelles Rome faisait des trâités, 'Habent republicam, curiam, ærarium, consensum civium et rationem aliquam pacis et fœderis.'"[1]

With this form of polity M. Viard contrasted the republic of Hayti:

"Dans laquelle les institutions les plus avancées sont en vigueur, et où la révolution règne à l'état endemique: personne ne songe pourtant à l'exclure de la communauté du droit de gens."

An eminent geographer, Dr. Oppel, has divided all the land of the world into three categories: uninhabited or ownerless tracts amounting to 1,694,000 square miles; land occupied by people with no definite political organisations, 5,023,000; and true States, occupying 45,100,000 square miles. Obviously the boundary line between the second and third classes must be somewhat arbitrary; no two investigators will agree as to the communities to be included within them.

The consequences of treating communities possessed of only simple political organisations as if they were in a legal point of view non-existent shock the consciences of people of to-day. The present practice is opposed to the view that they are not in some limited sense sovereign powers; the old assumption that only a limited number of highly organised States can be the subject of juridical relations is admitted to be inadequate. Treaties are concluded with aboriginal races. No nation deems its annexations legitimate without the colour derived from compacts with native chiefs. Here we are brought into presence of problems which international law has so far failed to solve. No clear idea has been arrived at as to the proper place in international law of communities which are not stationary, which have emerged from the condition of hordes, but which have made only

[1] See Ratzel's *History of Mankind* for accounts of many similar highly complex organisations among uncivilised communities.

slow and small progress towards the higher organisation of European States. At present, among writers on International Law there is no fixed opinion whether the territory of a native community with highly complex institutions suited for war shall be spared, while that of people formed with a less simple organisation, but of pacific disposition, may be appropriated. Confronted with the difficulties raised in discussing the true definition of *res nullius* in international law, the Institut de Droit International abandoned the attempt to define it. This reserve, this confession of the inability of jurisprudence to devise a formula to fix exactly the facts, may here be fitly imitated [1]; it is enough at present to say that the difficulty surrounding the subject will not be removed by analogies drawn from the *Digest*. It will be lessened by the habitual use of terms expressive of sovereignty in discussions relating thereto; it may be solved when there is an agreement as to what forms of primitive society, whether called States or not, merit respect and preservation at the hands of civilised nations.

To sum up, it is submitted that—

The law of occupation or possession should not be imported into discussions as to sovereignty;

There should be a franker recognition of the fact that usually the problem in disputes as to boundaries is not to discover a line which was once drawn and which has become obscure, but to find for the first time a natural or convenient frontier.

[1] See *Le Conflit Anglo-Portugais*, by Professor Westlake, in *Revue de Droit International*, 23, p. 243, for a discussion of this subject. For a non-legal view of the problem, see Drummond's *Tropical Africa*, p. 204.

AGREEMENT OF EUROPEAN POWERS AS TO LIQUOR SUPPLY IN AFRICA.

[*Contributed by* H. R. Fox Bourne, Esq.]

We may have to wait some time for an official report of the decisions arrived at by the International Conference which was opened at Brussels on April 20th, and it may be taken for granted that these decisions, when published, will be condemned by many as inadequate. The mere fact of the Conference being held, however, shows that the conscience of Europe, languid though it may be, is not quite dead to its responsibilities as regards the liquor traffic in "the Dark Continent."

"**Zone of Prohibition.**"—The Berlin Conference of 1884-5, giving sanction and stimulus to the "scramble for Africa" which has gone on busily for over fifteen years did no more than express a vague desire that "the native populations should be forearmed against the evils resulting from the abuse of spirituous liquors," and that "an understanding should be established to settle the difficulties that may arise on this score in a manner which reconciles the rights of humanity with the interests of commerce, in so far as these latter are legitimate." The Brussels Conference of 1889-90, which marked out a "spirituous liquor zone" comprising the whole of the continent except its most northern and most southern sections, prohibited the importation and manufacture of all spirits, so far as European control could exclude them, in the districts within the zone "where it shall be ascertained that, either on account of religious belief or from other motives, the use of distilled liquors does not exist or has not been developed." It also ordained that, as regards all districts under European control "where prohibition is not in force," a customs or excise duty of at least fifteen francs per hectolitre (about sixpence-halfpenny a gallon) should be levied for six years after the adoption of its General Act, which was not ratified till 1892; and that at the end of the sixth year, if not sooner, the Powers concerned should reconsider the question in the hope of an impost much higher than the minimum of fifteen francs per hectolitre being agreed to.

The first of these two philanthropic appointments has been but very partially enforced in some portions of the "zone of prohibition"; and the second has proved to be—as the late Lord Vivian, when he vainly urged

the Brussels Conference to fix the minimum duty at two hundred instead of fifteen francs, predicted that it would be—"an insufficient and useless check upon the increased consumption of strong drink by the natives of Africa." Great Britain has in all cases imposed higher duties than the prescribed minimum, the lowest being two shillings a gallon, except in one district of the Gold Coast, where it is only a shilling; and France and Germany have followed suit in some of their possessions. But in other parts, and notably in the French and Portuguese settlements adjacent to the Congo and in the western outlet of the Congo Free State, no more is done than the Brussels Act of 1892 requires. The six years, at the end of which this Act proposed that its liquor arrangements should be revised, moreover, had been outrun thirteen months before the second Brussels Conference met the other day; and those of us who, on the Continent as well as in England, have long been urging our several Governments to take such action in the matter as we contend to be no less prudent on economic grounds than obligatory on ethical grounds, had begun to fear that no fresh international agreement would be come to. If we now find that we get much less than we want, we must console ourselves by the thought that half a loaf, even a thin slice, is better than no bread.

International Agreement.—The African liquor question is one about which international agreement is indispensable to the proper working out of any philanthropic or equitable scheme that may be proposed. Our own Government—thanks in part to the personal interest taken in the matter by Lord Salisbury and Mr. Chamberlain—has done perhaps as much as could be expected of it in leading the way and running what are thought to be risks of injury to British trade from unequal foreign competition. But its difficulties may be illustrated by a reference to the case of our Gold Coast and Lagos colonies and protectorates. In the western and by far the larger part of the Gold Coast a duty of four shillings and sixpence a gallon is now levied on all imported spirits, and efforts are made to keep them out of the interior. In the eastern fragment, however, on the other side of the River Volta, only a shilling a gallon is charged, this being the amount corresponding to the charge which a few years ago the Germans were induced to make, instead of the sixpence-halfpenny they were formerly content with, in their adjacent colony of Togoland. The Anglo-German Convention of 1894 put a check on the ruinous competition that had previously gone on between rival German and English traders; but the smallness of the impost encourages the liquor traffic in these localities, and gives an unfair advantage to both the Germans and the English engaged in it over others in the rest of the Gold Coast. Yet an improvement here is deemed impolitic because in Dahomey, on the eastern side of Togoland, the French levy a spirit duty of only about eightpence a gallon; and, the duty being so low in Dahomey, not only traders in the Gold Coast and Togoland, but also those of Lagos, on its other side, where the duty was two shillings, but has just

been raised to three shillings by Mr. Chamberlain's order, consider that they have a grievance. Measured by the population of Dahomey, the supply of liquor to Porto Novo, its commercial capital, is very much larger than that to the rival ports in English and German territory; and whether or not there is much smuggling into their markets, the great variations within barely more than a hundred and fifty miles of coast-line cause much confusion and reasonable annoyance. An equalisation of duties, not merely over this short strip of coast-line, but along the entire coast, from French Senegal in the north to German Damaraland in the south, would clear away many complications, and if fixed at a high enough level to efficiently restrain the liquor trade would be of immense benefit to healthier commerce and to the social advancement of all the portions of Africa reached from the Atlantic, as well as to the political aims of the Europeans claiming authority over them.

The Germans, the French, and the rulers of the Congo Free State—our only competitors in this field of African enterprise, with the exception of the Portuguese—are discovering, as it was long ago discovered by the shrewder administrators of British possessions in Africa, that whatever immediate profits it may yield to those who embark in it, the liquor trade is a dangerous and destructive obstacle alike to native progress and to European interests. On this account they are all doing something, if not much, to deter their own black subjects from the drunkenness that adds to their present degradation. Why then, it may be asked, should there be any trouble in getting them to agree to some plan for keeping down the liquor supply, if not for altogether excluding it?

One of the hindrances to this sensible course arises from the unfortunate arrangements by which the "partition of Africa" has been affected. Leaving Liberia out of account, there are only five European Powers having possessions on the western side of Africa within the "spirituous liquors zone"; but those possessions number eighteen, and with the exception of three in English hands (Lagos, the Niger Coast Protectorate, and the Royal Niger Company's territory, which form a compact group), each of them is bounded on either side by the possession of a rival Power. Great Britain has seven, France five, Germany three, Portugal two, and there is the Congo Free State. Governments inclined, more or less, to protect their own natives from the drink poison see no harm in the poisoning of natives under other rule, if anything is to be gained thereby.

The political jealousy of which we had an alarming instance last year in the dispute between France and England over parts of the Niger district has every-day expression—less perilous, but by no means trivial—in the efforts of each settlement to get the better of its neighbours. As a larger and more lucrative trade is done in the British settlements than elsewhere, it is not surprising perhaps that they are especially exposed to this jealous competition. But it is chiefly in the interests of the spirit-producers in Europe that the African liquor trade is tolerated and encouraged. Hamburg

and Bremen owe much of their present prosperity to the potato-spirit which can be turned out in unlimited quantities within easy reach of these central marts. In like manner Rotterdam profits greatly by the coarse gin it obtains from Eastern Holland and other sources. A kindred industry is rapidly growing up in northern parts of France, and from the United States a good deal of inferior rum is still sent to Africa; but by far the larger part of the cheap stuff is shipped from the North German and Dutch ports, though much of it in vessels owned by Liverpool and other British shipping companies. Of the German cargoes, only a small portion goes to German colonies. Holland has no African colonies to which the Dutch cargoes can go. Thus, in the one case there is small inducement, and in the other there is none, for any attempt on the part of the Government to restrain, for the benefit of African savages, a traffic by which distillers and merchants at home make money. Hence, primarily, the inadequacy of the restrictive measures which were all that Lord Vivian could persuade the Conference of 1889-90 to agree to. For the same reason we dare not hope for much as a result of the negotiations resumed last month.

Trade and Liquor Traffic.—Just before the new conference entered on its work Mr. Chamberlain announced that, whatever the other Powers might do, Her Majesty's Government was resolved as soon as possible to raise to four shillings a gallon the duty on spirits imported into any of our West African possessions in which lower duty is charged at present, and to do everything in its power to exclude spirits altogether from the interior districts that are now, by railroads and other improved means of communication, being opened up to British trade. We are constantly assured by the Liverpool shipowners and their associates that African natives will not buy Manchester cottons or Sheffield tools or Birmingham gew-gaws unless each transaction is floated in cheap gin or rum; and that unless the buyer gets as much as he wants of this fiery liquid, at the price he is accustomed to, both for his own immediate consumption and for use in procuring palm-oil, rubber, or what not with which to continue his business, trade will be shifted from British markets in Lagos, the Gold Coast, or Sierra Leone, to the markets in German, French, or other territory, which will thus be enriched at our own colonies' expense. But the balance of experience is against the alarmists. As a set-off to any temporary shrinkage of trade, moreover, should it here and there occur, must be reckoned the unquestionable advantage that would ensue, in the long run if not at once, from the raising of our African trade from its present low level of morality. Encourage a man to be a drunkard, and he may be for a time a good customer to the gin-seller, but he will have little or nothing to spare on useful articles, and will soon be too poor and too sodden to buy even drink. If he is kept sober and raised in the standard of civilisation, he and his children after him will be an ever-increasing source of profit to the honest caterer.

Whatever may be the minimum duty resolved upon by the conference

lately assembled at Brussels, Mr. Chamberlain will have opportunity for carrying out his bold policy and expanding it indefinitely. Any example he may set to France, Germany, and other commercial and political rivals, in the way of purging the old markets of their vitiating conditions and of ensuring that the new markets to be opened up shall be as serviceable as possible, will have few, if any, risks, whether it is followed by them or not.

Mischiefs of the Traffic.—Exaggerated statements are often made as to the mischief already caused by the drink traffic in Africa. As yet it is, with some exceptions, only along the narrow fringe of coast line, not more than fifty or sixty miles broad, that there is much trade in European liquor or in any other sort of European commodities; and within this limit the proportion of excessive drinkers may not be much greater than it is in many European ports and trading centres. There can be no doubt, however, that Africans who acquire a taste for strong drink imported from Europe are apt to be more demoralised by it than is the European drunkard, and on economic no less than on ethical grounds the taste ought not to be encouraged. Short of complete prohibition, which is hardly to be thought of, it can only be restrained by increasing the cost of the objectionable article, and thus rendering it more difficult to procure. For this there would appear to be no other expedient than the imposition of customs duties sufficiently high to serve as a successful deterrent.

Exclusion from Free Districts.—Much more important, however, than any practicable interference with the liquor traffic in districts already contaminated by it—also, it may be assumed, less difficult, as here there are no "vested interests" to be assailed—is its exclusion as far as possible from the districts, ten or fifty times as great and populous, in which at present, "either on account of religious belief or from other motives, the use of distilled liquors does not exist or has not been developed." That is what all the Powers having possessions in Africa pledged themselves to do at the Brussels Conference of 1889-90. There has been more or less pretence of doing it by some, especially in the regions hitherto or still under Mohammedan rule, where bargains entered into with the native chiefs have provided for observance of the law of the Koran prohibiting the use of alcohol. But the pledge has been to a large extent ignored wherever, with or without Government consent, traders have contrived to push their way. Within the next few years, by help of the railroads now being constructed, they will be able to go much further into the interior, and in all directions, than hitherto. Stringent measures ought therefore to be taken without delay for stopping their progress as far as the conveyance of liquor is concerned. Mr. Chamberlain has promised that this shall be done within British possessions, and it is understood that at the new Brussels Conference the British plenipotentiaries had instructions to do all in their power to secure the co-operation of their foreign colleagues in establishing a comprehensive rule on the subject. Such a rule is of

course easier to make than to enforce; but its enforcement should be simplified by the fact that all or nearly all the railways now in process of construction are to be Government property, and that only four Powers at present are responsible for their control. These Powers are Great Britain, France, Germany, and the Congo State (which has up to now done more railroad-making than any of the others, and which professes itself loyal to the British policy).

Railway Control.—There were over a dozen European States represented at the recent Brussels Conference. But apart from Portugal and Liberia, which have shown no railway enterprise, the four I have named have the future of the African interior in their own hands. An agreement among these four would save the African interior from the drink curse which has already done so much harm on the coast. If they will promptly settle the matter in a way as conducive to their own material interests as to the welfare of the natives of Central Africa, a great and statesmanlike and beneficent step will be taken.

SOME NOTES ON M. LYON-CAEN'S PRESIDENTIAL ADDRESS TO THE SOCIÉTÉ DE LÉGISLATION COMPARÉE.

[*Contributed by* Sir Courtenay Ilbert, K.C.S.I.]

The address delivered by M. Lyon-Caen, as President of the French Society of Comparative Legislation, at its annual meeting on December 14th, 1898, presents many points of interest, both to students of comparative legislation in general and to the members of our English Society in particular. The following paragraphs summarise the most important portions of the address. It will be seen from the concluding remarks that parliamentary legislation has its critics in France also.

M. Lyon-Caen began by comparing the life of a learned society to the life of a man. During the periods of human infancy and youth there are profound and incessant transformations, important events, successes and failures, which are often decisive for the rest of life. Then comes a period of uniformity. So with a learned society. It begins by starting new publications and making different experiments. Then it goes on gradually developing and improving its work, but making no material change in the character of the work.

The French Society of Comparative Legislation—now nearly thirty years old—began by publishing, in 1869, a monthly bulletin. It added, in 1872, an annual review of foreign legislation, and, in 1882, an annual review of French legislation. These publications have been gradually improved, but it is not likely that there will be any addition to their number.

But the year 1898 has been marked by two important publications: a second edition of the *Catalogue of the Society's Library*, and an index to the twenty volumes of the *Annual Review of Foreign Legislation*.

The first edition of the *Catalogue*, published in 1885, contained 1,200 entries, representing about 2,000 volumes. The new edition contains 5,469 entries, representing some 11,000 volumes.

The *Index* to the annual reviews of foreign legislation consists of two parts —one arranged chronologically with reference to each country, the other arranged alphabetically. It is to be published in the course of the present year, and will constitute a feature in the Exhibition of 1900.

This valuable index throws great light on the course of the world's legislation during the last twenty years. During this period, M. Lyon-Caen observes, the movement of codification, so brilliantly begun in France at the opening of the century, has been continued and accentuated in foreign countries. It has been favoured by the political unification of several States and by the tendency towards centralisation in others. Germany obtained in 1879 Codes of Civil and Criminal Procedure and of Judicial Organisation, and has since passed a civil code and a new commercial code, both of which are to come into force at the beginning of the year 1900. Italy recast, in 1882, its Commercial Code of 1869, and in 1889 passed a general penal code, which took the place of the several local codes previously in existence. In Switzerland the great Code of Obligations came into force in 1883, and was supplemented in 1889 by a law on Bankruptcy and Procedure for Debt. In Austria the Codes of Civil and Criminal Procedure have been recast. Commercial codes have been passed or revised in Hungary, Spain, Portugal, Roumania, and Belgium. Great Britain still remains "refractory" to codification. It still rests content with its common law and its scattered statutes. But its statutes are encroaching more and more on the province of unwritten law, and its Consolidation Acts are perhaps paving the way for future codes.

The laws of 1870 to 1890 touch on the greatest variety of subjects. But everywhere there are a certain number of identical questions which have pre-eminently occupied public opinion and pressed for legislative solution. Among these are questions of Criminal Law. Everywhere attempts have been made to improve Criminal Procedure, with the object of securing liberty of defence and discovery of truth, of making punishments less severe and more effective, of facilitating the reform of convicted criminals and fighting against "recidivism." Together with questions of Criminal Law, the so-called "social" questions have been the subject of numerous laws even in countries like Great Britain, where tradition has hitherto been unfavourable to the activity of the State and its intervention in private affairs. To the great honour of our age, legislators have attempted, by laws on industrial accidents and on service and labour contracts, to protect the weak and to improve the situation of those whom the chances of birth have placed in an inferior position.

Of course, the solutions arrived at have not been everywhere identical. But there is much to show that uniformity of law is not an unrealisable ideal in matters not intimately bound up with the habits and religions of particular countries, and particularly in matters of commerce. Thus the three Scandinavian States have passed an identical law on bills of exchange and a common code of Maritime Commerce. The Convention of 1890, on the international transport of goods by railway, indicates another step in the same direction.

The *Index* does not extend to French legislation; but the annual

summaries show that there also legislative activity has not been less than elsewhere.

France finished her great work of codification before any other country. Her codes, especially the Civil Code and the Commercial Code, served during the first half of this century as models for almost all the codes of foreign countries. Her five codes are at this moment the oldest in the world. Consequently, without denying their great value, it must be admitted that they are not on all points in touch with modern ideas, or up to the level of recent science, or adapted to the needs created by the transformation of means of transport and the increased facility of communication. Hence their numerous amendments and additions. But up to this time the legislature of France has shrunk from the task of revising and recasting any one of her codes, though such a revision is much needed to remove inconsistencies and inelegancies.

Many of the amending measures are open to the charge of unduly complicating legislation. They do not always rest on principle. They are often of a very special character. In this respect France seems to be imitating—perhaps involuntarily—English methods of legislation.

Nor is this all. The art of legislative expression, which in the first half of the century was carried in France to a rare degree of perfection, seems to be becoming lost. The new French laws are too often obscure and incomplete. On this point critics are unanimous. "It often seems as if under the pen of our legislators our beautiful French language is losing its luminous clearness."

The causes of this deterioration it was not for M. Lyon-Caen to explain. He could only repeat what has been said by many others, that large political assemblies are not well suited for the serious and detailed discussion of laws of general application, especially in the domain of Civil and Commercial Law.

The legislature itself has been impressed with the evil. A new Standing Order now under discussion by the Chamber of Deputies has been formed, with the object of making the machinery of legislation more rapid and effective. But will it change the habits of legislators? *Quid leges sine moribus?*

MODES OF LEGISLATION IN THE BRITISH COLONIES: THE BAHAMA ISLANDS.

(*Being answers to a series of questions addressed by the late Lord Herschell—the then President of the Society—to the Secretary of State for the Colonies, to obtain information respecting the common and statute law of the several colonies, the methods of legislation, the publication revision, and consolidation of statute law and matters connected therewith: see p.* 70, ante.)

[*Contributed by* Sir Ormond D. Malcolm, C.J.]

Common Law as the Basis of Statute Law.

(*a*) *What is the common law of the colony? Under what circumstances and by whose authority was it introduced?*

The common law of the Bahama Islands is the common law of England. Although these islands were discovered by Columbus in 1492, and occupied by the English in 1629, they were not finally established as a British possession until about 1783. The original acquisition being by settlement, the settlers brought with them so much of the common law of England as "was necessary, convenient, and not inapplicable to the circumstances of the settlement." But it is worthy of especial note that so early as 1799 a local Act (40 Geo. III., c. 2), which has been called the "Declaratory Act of the Bahamas," made an attempt to give a full and clear account of what part of the law of the mother country should be deemed to be of force and binding in the colony, instead of leaving it to the varying discretion of successive judges. The Act contains a curious preamble, which, after reciting the necessity for removing existing doubts, ends thus:

> "The common law of England in all cases where the same hath not been altered by any of the Acts or Statutes hereinafter enumerated, or by any Act or Acts of Assembly of these Islands (except so much thereof as hath relation to the ancient feudal tenures to outlawries, in civil suits, to the wager of law or of batail, appeals of felony, writs of attaint, and ecclesiastical matters) is, and of right ought to be, in full force within these Islands as the same now is in that part of Great Britain called England."

From which it appears that the amount of common law proper which was extended was the unaltered residuum existing in 1799—with the parenthetical exception in the foregoing preamble.

(*b*) *Is there any law applying exclusively to particular races or creeds?*

There is not now any law applying exclusively to any particular race

or creed except those which disendowed and disestablished the local branches of the Churches of England and Scotland.

Statute Law.

(*a*) *Of what does the statutory or enacted law of the colony consist? To what extent is it embodied in charters, regulations, orders in council, ordinances, or Acts.*

The statutory or enacted law of the colony consists of—

(i) Imperial statutes:

(*a*) Expressly or by necessary intendment applying to the colony.

(*b*) Extended by local enactment.

(ii) Local Acts—the earliest now in force is 1784.

(iii) Letters patent under the Great Seal of the United Kingdom, dated April 28th, 1876, constituting the office of Governor and Commander-in-Chief, and Royal instructions under the Royal Sign Manual and Signet to the Governor, dated March 26th, 1892. The letters patent and instructions create the councils and specify their and the Governor's powers.

(iv) Orders of the Governor in Council, and regulations made by the Governor in Council and by the Chief Justice and Local Boards, and submitted for the sanction of the Governor in Council.

(*b*) *To what extent do the statutes of the United Kingdom operate in the colony by virtue of either—*

(i) *Original extension of English law to the colony;*

(ii) *Express provisions of any order in council or charter; or,*

(iii) *Express adoption by the Legislature of the colony?*

(i) All English statutes in existence at the time of the original settlement as were "necessary, convenient, and not inapplicable to the circumstances of the colony" were operative.

(ii) Regulations made by Her Majesty in Council in virtue of some Imperial statute, or the statute itself, are or is extended by an order in council to the colony by name.

(iii) A local Act of 1799, the one which declared the common law in force, extended 207 Imperial statutes (from 9 Hen. III. to 30 Geo. II.); and from time to time numerous other Imperial statutes have been so extended. The existing practice is to reproduce, as if it were the original Act of the local legislature, the more important Imperial statutes with such variation as local circumstances require.

(*c*) *Is the statute law of any other colony in force in the colony?*

There is no statute law of any other colony.

(*d*) *Is any code or other body of enacted law of non-British origin in force in the colony?*

No: there is no code or other body of enacted law of non-British origin in force in the Colony.

Methods of Legislation.

(*a*) *By whom are drafts of legislative measures prepared? Is there any official draftsman? If so, by whom is he appointed? to whom is he responsible? and what are his staff and duties? Do his duties extend to measures introduced by private or non-official members of the legislative body?*

There is no official draftsman. The Attorney-General, who is appointed by the Crown, and is *ex-officio* a member of the Executive Council, drafts Government measures, as well as those introduced by private members. He has no staff. The draft official measures are before introduction in either of the legislative chambers submitted to the Executive Council, whose constitution is governed by the Royal instructions issued to the Governor, and which consists entirely of official and nominated members.

(*b*) *What is the constitution of the legislative chamber or chambers through which measures have to pass? If there are two chambers, may measures be introduced in either?*

There are two chambers, in either of which measures may be introduced. For the constitution of these chambers the reader is referred to Anson's *Law and Custom of the Constitution* (second edition, vol. ii., p. 264, and Appendix II., p. 485).

(*c*) *Are draft measures published before introduction or before any other stage? If so, under what rules?*

Draft measures are not published either before introduction or any other stage.

(*d*) *Through what stages does a measure pass before it becomes law?*

A measure passes through three readings in each chamber, and in the Legislative Council the passing is certified to by the President, in the House of Assembly by the Speaker. In the absence of a suspending clause it comes into operation upon the assent of the Governor. Further official notice is given, however, of the intention of the Secretary of State for the Colonies not to advise Her Majesty to exercise her power of disallowance. The procedure is substantially the same as in the Imperial Parliament.

(*e*) *Is any opportunity afforded for referring measures while in course of passage through the Legislature to any special officer or committee on points of form?*

No opportunity is afforded for specific reference on points of form, but at any time after the first reading it may be referred to a select committee, and after the second reading is invariably considered in a committee of the whole House.

(*f*) *Have any steps been taken to secure uniformity of language, style, or arrangement of statutes, either by means of a measure corresponding to "Brougham" Act* (13 & 14 *Vict., c.* 21) *or to the Interpretation Act*, 1889 (52 & 53 *Vict., c.* 63), *or by official instructions or otherwise?*

There is a local Act known as the "Interpretation Act, 1897," which has been taken partly from the Imperial Act (52 & 53 Vict., c. 63).

(*g*) *Is there an annual session of the Legislature? Are there any fixed or customary periods of session?*

An annual session of the Legislature is usually held in February, and lasts for about three months. It is necessary for the purpose of passing an Appropriation Act authorising supplies for the year, but there is no legal obligation to call the Legislature together at any time.

(*h*) *How are the Acts or ordinances of the colony numbered or distinguished? Are they numbered by reference to the calendar year or to the regnal year or in any other way? Is it the practice to confer for convenience a "short title" on each Act or ordinance? How long has this practice been followed?*

The Acts of the colony are numbered in reference to the regnal year. It has been the custom of late to give a short title to each Act.

(*i*) *Are private Bills (if any) treated separately and under different conditions from public Bills? On what principle is the line drawn between public and private Bills? Are private Acts or ordinances separately numbered?*

It is very seldom that a private Bill is passed. Such Bills would not be treated separately or under different conditions from public Bills. There is no line drawn between public and private Bills, nor are the latter numbered separately.

(*j*) *Does any franchise exist of accompanying a measure on its introduction by an explanatory memorandum?*

No regular practice exists of accompanying a measure on its introduction by an explanatory memorandum. Its introducer usually explains it. The Attorney-General is required to report on each Act of the session, and such report, which contains his opinion as to the propriety of allowing or disallowing the Act, is forwarded to the Secretary of State for the Colonies.

Publication of Statutes.

(*a*) *In what manner and under what authority are statutes promulgated? What evidence is accepted of a statute having been duly passed?*

After an Act has been allowed or disallowed by Her Majesty, such fact, together with the title of the Act, is published by the Governor's direction in the *Official Gazette*. The Acts of each session are printed in a collected form at the end of the session, and are distributed among the heads of departments, the members of the two chambers, and all magistrates. The production of the *Official Gazette* or of the pamphlet in which the Acts appear printed is accepted as evidence of a statute having been duly passed.

(*b*) *In what form or forms, and under what authority, are statutes printed for publication?*

In a collected form, as stated above, under the authority of the Governor.

(*c*) *Are the statutes of each session published in a collected form at the end of the session?*

They are so published.

(*d*) *Are the periodical volumes of statutes accompanied by* (1) *an index and table of contents*, (2) *a table showing the effect on previous legislation?*

These pamphlets contain (1) an index and table of contents, but not (2) a table showing the effect on previous legislation. However, a consolidating or amending Act usually contains a section or marginal note or appendix declaring, referring to, or showing the extent of the repeal or amendment of sections of or entire former Acts.

(*e*) *What collective editions* (*if any*) *of the statute law of the colony have been published, and whether by the Government or private enterprise? Are these or any of them periodical? Do such editions comprise those Acts of the United Kingdom in force in the colony?*

The last published collective edition is the one of 1877. It was prepared by the then Attorney-General (Sir George Anderson), and carried out under the authority of the Governor by virtue of a special Act. There are not periodical reprintings; but a new edition is now in contemplation, and will be prepared by the Chief Justice of the Colony acting under the authority of the Governor. The edition of 1877, and the one to be prepared, will contain—but not *in extenso*—all Imperial statutes in force in the colony.

(*f*) *Is there any edition of "Selected Statutes" corresponding to Chitty's "Statutes of Practical Utility"?*

There is no edition of selected statutes of the colony.

(*g*) *How are private Acts published?*

There is no distinction between public and private Acts. They are published together in the same pamphlet, and are numbered consecutively. Private Acts refer almost exclusively to religious corporations and trading companies.

Revision of Statutes.

(*a*) *Have any steps been taken for the revision and expurgation of the statute law, whether periodically or otherwise? What machinery* (*if any*) *exists for this purpose?*

No steps have been taken for a revision and expurgation periodically. The only instances of revision are those authorised by special Acts resulting in the editions of 1850, 1862, and 1877. A revision and expurgation will take place for the purposes of the contemplated new edition.

(*b*) *Is there any edition of the "Revised Statutes" showing those actually in force? If so, under what authority is it prepared and published, and what is the date of the latest edition? Is it published at periodical intervals, or how otherwise? Are the contents arranged alphabetically, chronologically, or on any other principle?*

The only published edition of the statute law of the colony is the one of 1877. All laws since then have been printed in pamphlet form at the end of each annual session. The new edition will contain all statutes in force up to a certain date, which will probably be the end of the next

annual session of the Legislature. The edition of 1877 is arranged subjectively, and contains a Chronological Table, a Schedule of the Imperial Statutes extending to the Colony, a Schedule of the Statutes of the Colony, and an Analytical Index. The same arrangement will be adopted in the new edition.

Indexing of Statute Law.

Is there any general index to the statute law of the colony? If so, on what principle is it arranged, and after what interval is it revised? Does it include both public and private Acts or ordinances and the statutes of the United Kingdom which are in force in the colony? Is it accompanied by any table showing how each statute has been dealt with? What is the date of the latest edition?

The only general index of statute law, which includes both public and private Acts and Imperial statutes, is the one contained in the edition of 1877. It is arranged both chronogically and alphabetically.

Consolidation and Codification.

(*a*) *What steps have been taken to consolidate the whole or particular parts of the statute law, or to codify any branches of the law? Does any machinery exist for the purpose? Is the work now in progress?*

No attempt has been made at a general consolidation or codification, but numerous Acts have consolidated particular parts of the statute law.

(*b*) *What "codes" are now in force in the colony? When and by whom were they prepared, and on what materials are they based?*

The most recent consolidation and the only codification is in connection with the constituting of a Supreme Court and in respect of the law relating to magistrates. The Supreme Court Act is modelled on the Judicature Acts of England, and the Magistrates Act after English and Colonial statutes. The work was carried out in 1895 and 1896 by Sir Charles Walpole, the then, and Sir Ormond D. Malcolm, the now, Chief Justice of the colony.

Subordinate Legislation.

What official or other machinery exists for the preparation, passing, or promulgation of measures of subordinate legislation such as rules or orders made by the Governor or a minister or department under the express authority of statute or ordinance? Is there any and what collection of or index to such subordinate measures?

Various Acts authorise the making of rules by (1) the Governor in Council and (2) the Chief Justice and the various Boards—*e.g.*, works, health, pilotage, etc., etc.—for submission to the Governor in Council. These are published in the *Official Gazette*, but there is no collection of or index to them.

January 1899.

THE DEFENCE OF PRISONERS.

[*Contributed by* T. R. Bridgwater, Esq.]

The General Council of the Bar has recently passed a resolution "that it is in the interests of all prisoners (considering their interests alone) that they should be defended by counsel." Such a procedure is not unknown in other countries, in the British Colonies, and in Scotland; but it would, if carried into effect, be a novelty in English criminal courts. All accused persons in England having sufficient means can, it is true, be defended by counsel. A prisoner arraigned in court has even the right to claim the services of the most distinguished counsel present by payment of a small nominal fee. Prisoners without any means are sometimes gratuitously defended by counsel, and judges often request counsel to defend undefended prisoners.[1] Probably no judge fails to see that a prisoner charged before him with a capital offence has counsel allotted for the defence. Such a custom, observed when grave offences are in question, might well be extended to all offences. This is the proposition which the resolution of the Bar Council affirms, without, however, pointing out the mode by which the desired end is to be attained.

It is not the purpose of the present article to supply such omission or to define the best method of carrying out the resolution passed: this may best be left to such separate organisations of the Bar as the circuits and sessions. Nor is it intended here to express any opinion before what tribunals prisoners should be defended, whether before summary tribunals or only before tribunals charged with the trials of indictable offences, though it might fairly be said that in the interests, not only of prisoners, but of the administration of justice, and therefore of the whole community, every person charged with an offence of sufficient importance to be prosecuted by an advocate ought to be defended by one. The design of this article is to show that the proposed innovation is a more or less recognised system already at work in foreign countries, in some of the British colonies, and in Scotland.

[1] Even then, as Sir Fitzjames Stephen once said, "is it not very hard upon a poor prisoner that he should have no better means of obtaining counsel than the request of the judge at the last moment to some junior barrister?"

The treatment of accused persons in England in former times is a dark chapter in our legal annals. That such persons down to quite recent times were not allowed to have counsel to defend them at all is no revelation to lawyers, though it may be to some laymen. This barbarous rule (equalled only for irrationality by a similar rule, which required all criminal trials to end in one day) deprived prisoners accused of any capital offence, except treason, of the assistance of counsel unless some question of law arose which it was necessary to discuss. In felony trials, by permission of judges, counsel were allowed to stand beside the prisoner instructing him what questions to ask; but the accused himself had to cross-examine the witnesses. He might not address the judge or jury unless some legal question had arisen. Commenting upon all this, Sir James Stephen says: "From the middle of the eighteenth century to our own times there has been but little change in the character of criminal trials. The most remarkable change was the relaxation gradually of the old rule which deprived prisoners of the assistance of counsel in trials for felony—a practice sprung up the growth of which cannot now be traced, by which counsel was allowed to do everything for a prisoner accused of felony except addressing the jury for him. It was not until 1836 that an Act (6 & 7 Wm. IV., c. 114, s. 1) was passed which allowed prisoners accused of felony to make their full defence by counsel, and so placed all felony trials on the same footing as misdemeanours. Yet one hundred and twenty years earlier Blackstone had acknowledged that there was no plausible reason why the same assistance should not be granted to poor, ignorant, and terror-stricken prisoners in cases affecting their lives, as in cases of petty trespass; or, in other words, why legal assistance should not be allowed in the graver offences of felonies as in the lesser offences of misdemeanours." We have now advanced one step further, in the sense that gratuitous assistance is occasionally directed by our judges to be given to prisoners in grave cases. Why then should not similar assistance be extended to all cases where the liberty of the subject is in question, a defence being before the court?

In England, France, and Germany a criminal case may be disposed of at the preliminary enquiry or first stage. As in England indictments may be preferred where no preliminary enquiry has taken place, so in France a trial may take place without *l'instruction*. In Germany there is a procedure unfamiliar in England—the examination of the accused in the preliminary enquiry before the magistrate, without the presence of the public prosecutor or the prisoner's counsel.

France.—Before the criminal police court the prisoner may be represented by an *avoué* (a solicitor) if accused of an offence not punishable by imprisonment. If an accused person wishes to be defended and cannot afford it, he may, by applying to the *Bâtonnier des Avocats*, have appointed by him a junior who gives his services gratuitously. The same applies to civil matters, but is much more complicated.

In all cases tried before a jury the prisoner is asked, before the trial, to select a counsel, and failing to do so the president of the court or a judge appointed by him selects a counsel. The counsel must as a general rule be taken from the *rôle* of *avocats* (advocates) or *avoués* (solicitors) registered in the Court of Appeal of the district; but on the prisoner's application, the president of the court may allow him to be represented by a relative or friend. Counsel is allowed to see all depositions, and is granted an adjournment of the case if he requires it to prepare the defence. The costs of such proceedings ordered by the court are advanced from the Government funds; and the prisoner is ordered to repay them if found guilty and sentenced, if acquitted he is discharged from all responsibility for costs. The counsel, if appointed by the court, is not allowed to refuse the brief, and his fees are paid out of Government funds. A prisoner, therefore, without means secures the services of counsel without payment. It should be recollected that in France all the expenses of a criminal trial, including the prisoner's witnesses, experts, interpreters, are all borne by the court—all but counsel's fees.

Germany.—In Germany there is even greater consideration for the rights of the defence than is shown by the French code. The appointment of a counsel for a prisoner is compulsory from the earliest stage of the proceedings, in all matters which (1) are tried before the Supreme Court at Leipzig, (2) in all matters which have to be tried before a jury, (3) or when the prisoner is deaf or dumb or has not completed his sixteenth year. A prisoner is entitled as of right to have counsel appointed at his option in all matters, other than in those matters above mentioned, where the maximum punishment exceeds five years' penal servitude or imprisonment in a fortress; and also in matters not above mentioned, if urgent and on the prisoner's application. The president of the court (or, if counsel is appointed in the preliminary proceedings, the local judge) selects the counsel from the advocates residing in the places in which the court is situate. There may also be appointed as counsel, a judicial officer, not being a judge, and any person preparing for the legal profession or judicial office having passed the first Government examination. If a prisoner wishes to select his own counsel, other than the counsel appointed for him by the court, he may do so, and the court will order the official counsel's appointment to be revoked. The payment of counsel appointed by the court is the same as in France: the fees are paid from the public funds; if the prisoner is ordered to pay the costs, this does not concern his counsel—he (the counsel) is paid by the public authorities, who in their turn recover as much as they can from the prisoner. Again, in Germany as in France, a prisoner may employ an unqualified person, by consent of the court; but where the appointment of counsel would otherwise have been compulsory—*i.e.*, in Germany—an unqualified person can only act together with a properly qualified person.

Italy.—In Italy the appointment of counsel is unnecessary in the case of a

prosecution for a minor offence (*contravention*). But in all cases constituting a criminal offence (*delitto*) a counsel must be appointed; and if the prisoner does not select one, the president of the court or the local judge appoints one. Before the police court (*pretore*), any one being of full age and entitled to exercise his civic rights may appear as counsel. Before the criminal court without juries (*tribunale penale*), any advocate or solicitor (*procurator*) practising in the courts may be chosen. Before the criminal court with juries (*Court d'Assize*) the prisoner's counsel must be an advocate. No counsel, whether selected by the prisoner or by the court, except for sufficient reason, is allowed to refuse his services. Officially appointed counsel are selected by rotation. Therefore counsel's assistance, as in France, is applicable to the last stage only of the proceedings. In all public prosecutions the costs are advanced by the State; whether this includes the fees of counsel appointed by the court, as in France and Germany, is uncertain.

Belgium.—At the Brussels Conference in 1897 the following facts were elicited as to the procedure in Belgium,—that the Junior Bar interests itself in the defence of undefended persons, especially in the defence of paupers and young persons accused of crime; and committees exist for these purposes composed exclusively of barristers.

Norway.—In Norway there appears to be some system for the defence of prisoners; for (it is understood) a somewhat curious practice exists there, that before admission to the Bar each student has to show that he has defended at least three or four prisoners—presumably gratuitously.

Denmark.—In Denmark a very interesting institution is at work known as the Danish *Retshjaelp* (legal helper), which gives legal advice and assistance in all matters to the poorer classes, and is carried on by advocates and students. It was first instituted by the "profession" in 1885, and has been carried on ever since, and is presided over by a distinguished member of the profession. A full and interesting account of this is given in an article called "A Poor Man's Lawyer in Denmark," in the *Law Quarterly Review*, vol. vii., p. 174.

United States.—In the United States of America the custom varies somewhat in different states. In the courts of the commonwealth of Massachusetts it is the custom to assign counsel for the defence in cases where the accused is charged with a capital offence. Senior and junior counsel are generally assigned, and their fees are paid by the Government, as well as all the other expenses of a defence. The defendant has no choice of a counsel. The fees range from one hundred to sometimes seven hundred dollars. There is a further provision which entitles a person accused of capital crime or crime for which the penalty is imprisonment for life, or where a person accused is supposed to be insane, to have Government process to summon all witnesses, including expert or medical witnesses, necessary for his defence, at the expense of the commonwealth. The prosecuting counsel

or the court may interfere to prevent the accused summoning a host of witnesses whose testimony can be of no value. When a person is accused of any offence, and is not represented by counsel, it is the practice of the district attorneys always to submit their case without argument.

In the States of Arkansas, Alabama, California, Illinois, Iowa, Kansas, Michigan, Missouri, New York, Georgia, Pennsylvania, and Tennessee, a member of the Bar is appointed by the court to defend a prisoner indicted on a criminal charge if the prisoner has expressed a desire for counsel to defend him. Counsel cannot charge for his services, and the State is not liable for such expenses. This is upon the principle that an attorney is an officer of the court, and that this is one of the duties which he assumed when appointed an attorney-at-law. The States of Washington and Iowa have even gone further than this by passing statutes providing that attorneys-at-law shall under such circumstances defend gratuitously; but in Indiana, Alabama, Ohio, Nebraska, and Wisconsin there are statutes providing for the compensation of attorneys who so defend; and in Nevada a judge has authority under statute to allow compensation not exceeding fifty dollars, and in Maine up to one hundred and fifty dollars.

British Colonies.—In Canada, in the Superior Court it is the practice to assign counsel to prisoners unable to employ one, the service of counsel being honorary, and no provision being made for their remuneration. But the practice of Canadian courts is to allow the expenses of witnesses for the defence, which are borne by the Crown, where, on application to the court, the court is satisfied that the prisoner is unable to procure witnesses from lack of means.

In New South Wales all aboriginals accused of crime have professional assistance provided for them as a matter of course, and fees are paid to counsel for that purpose; and, further, the annual estimates of the colony provide a small sum for the defence of impecunious prisoners on capital charges.

The Queensland Government also provides for the defence of aboriginals and of Polynesians charged with indictable offences, at the expense of the Government. It allows a fee, varying in amount, but usually ten guineas, to counsel for the defence of any person charged with murder, and who is in destitute circumstances, the selection of counsel being left to the accused.

In Victoria the arrangements for the defence of aboriginals and persons accused of capital crimes are always made before the trial; and by an Order in Council all persons without means may apply to the sheriff, who may communicate with a barrister or solicitor named by the prisoner, and report the same to the Attorney-General. Witnesses for the defence are paid on the same scale as Crown witnesses, providing the judge certifies to their being necessary and material.

Scotland.—The system for the defence of prisoners in Scotland (as well

as for assisting the causes of the poor) is perhaps the most extensive and elaborate to be found anywhere. In the Supreme Court, agents (*i.e.*, solicitors) for the poor are appointed annually by the two bodies known as writers to the Signet, and solicitors before the Supreme Court, each society nominating two agents for civil causes and two for criminal trials. The agents appointed are such as have joined the respective bodies during the foregoing years. In the sheriffs' courts the agents for the poor are appointed by the solicitors enrolled as practitioners before those courts. The number varies. In Glasgow twenty are annually appointed.[1] In criminal cases, those defending in *forma pauperis* have not to verify their poverty or show a *probabilis causa litigandi* (as in civil causes).

Agents for the poor inform themselves as to cases by visiting goals; and the prisoners, if they plead not guilty, are defended on trial. Provision is made for distributing the cases fairly among the various counsel and agents. Should a case be left derelict, the judge assigns counsel from among those present. Neither counsel nor agents for the poor receive remuneration. The agent in charge of a case is not bound to defray the expense of bringing witnesses. It is a common opinion in Scotland that these expenses should be provided from some public source.

In practice, therefore, in Scotland all prisoners have the benefit of professional assistance. Fewer prisoners plead guilty than would otherwise do so; but it has never been a matter of complaint that the expenditure of time thus involved was an evil or not compensated by the advantages of a general system providing for fair trial. In the Supreme Court the poors' counsel have the right in difficult cases to invoke the assistance of the Dean of Faculty of Advocates in the conduct of a defence. A learned writer (Archibald Alison), writing on the practice of the criminal law in Scotland, says: "Prisoners in Scotland are invariably furnished with counsel. If they are too poor to fee themselves, they are assigned them by the court, and this duty the barristers are not permitted to decline. If no barristers are present, the sheriffs of the counties, who must be there, are named by the court to undertake that office." For many years one of the most distinguished writers of the present century (Sir Walter Scott) was regularly nominated to that duty at the Jedburgh Circuit, and the talents which have rivetted the admiration of both hemispheres were often gratuitously and successfully exerted in defending the humblest and most destitute of the Scottish prisoners. It is seldom, however, that this duty is devolved upon the sheriffs of the counties. The great competition of the Bar induces numbers of young men to travel the circuit, at a very heavy loss to themselves, for the purpose of acquiring information and distinction.

[1] In Edinburgh the Faculty of Advocates offer the office of counsel for the poor annually to six members of the Bar, called subsequent to 1868, in order of seniority. There is no salary, but expenses awarded against the opposite party may be recovered by the agent or counsel who acted.

The same learned writer goes on to say: "Often counsel of the first eminence gratuitously undertake the cases of the poorest prisoners. It is not unusual to see the same counsel who are retained in the cases of the first peers of the realm on one day engaged the next in the defence of the poorest and most destitute criminals."

England.—In England the Crown nominally prosecutes in all cases; actually, cases are prosecuted by private persons, public bodies, and the police. When none of these prosecute, the Crown or the County do so. The Crown means the Imperial Treasury; the County, the County Treasury: and it is upon these two bodies that all or nearly all the expenses of a criminal prosecution fall. It was not until 1752 (25 Geo. II., c. 36, s. 2) that the costs of a private prosecution were ordered to be paid by the County Treasury, and not until 1867 that the expenses of witnesses for the accused who are bound over by recognisances to appear at the trial were allowed. These are all the expenses allowed at the present day. That no expenses were allowed to persons wrongfully accused troubled the benevolent mind of Sir Samuel Romilly in 1807, for in his diary (vol ii., p. 229) he says he has in contemplation in the reform of the criminal law to invest the criminal courts with a power of making such compensation to be paid out of the County rates.

It will thus be seen that England is far behind both Scotland and her colonies and many foreign countries in providing for the defence of accused persons. The subject occupied the mind and troubled the conscience of one, if not the greatest, of her jurists, Jeremy Bentham; and there can be no better conclusion to this article than to quote from the "Draft for the Organisation of Judicial Establishments" his weighty comments upon the necessity of the office of a Defender-General: "Is," he asks, "the office of Defender-General a needless one? Is it much less indispensable than that of Pursuer-General? Can it be right that there should always be somebody for the prosecution of delinquency and that there should never be anybody for the defence of innocence? In England, as in France, the policy as to this matter remains still in the same state in which it was first traced out. . . . It was the interest of the king that those who were guilty should be punished. It was no interest of the king's that those who were not guilty should escape. By their punishment he could get something—by their acquittal he could get nothing; they were accordingly left to provide for it as they could. In the eye of common sense, of justice, and of humanity, there are two parties to every cause, but despotism acknowledges but one. In the Pursuer-General you have a magistrate ready to be charged with the cause of the plaintiff too poor and too friendless to find another advocate. Under a penal prosecution, is the poor man, of all others, to have none to help him?"

ALLEN v. *FLOOD*: IN ROMAN LAW.

[*Contributed by* WALTER H. GRIFFITH, ESQ.]

By the common law it is not actionable through motives of ill will to induce an intending contractor not to enter into a contract with a potential promisee (*Allen* v. *Flood*[1]). By the common law, as at present declared, it is actionable through motives of ill will to induce an actual contractor to break an existing contract with any actual promisee (*Lumley* v. *Gye*[2]; *Bowen* v. *Hall*[3]). We say "as at present declared" because neither of the two last cited cases has been reviewed in the House of Lords. The doctrine which they establish has, however, been fully recognised in America (*Walker* v. *Cronin*[4]; *Angle* v. *St. P. M. & O. Ry. Co.*[5]).

Before the decision of *Allen* v. *Flood* opinions in England were divided as to the principle on which the doctrine of *Lumley* v. *Gye* and *Bowen* v. *Hall* was founded, some asserting that the doctrine was a particular example of a general principle, that it is actionable to cause temporal loss or damage without lawful excuse, and that motives of ill will do not constitute lawful excuse; others holding that it was an extension of a branch of the law of master and servant—viz., that the abduction of a servant is an actionable wrong. In the latter view the existence of a contract is essential to constitute a cause of action; in the former it is not. In the latter case the cause of action alleged in *Allen* v. *Flood* would lie; in the former it would not. The former view has not prevailed.

How has the Roman law dealt with these questions? By that law he who persuaded a slave to run away was liable to an action, not of theft (*furtum*) (*Dig.* 47, 2, 36[6]), but of fraud (*dolus malus*) (*Dig.* 4, 3, 31[7]). So much for the abduction of servants.

We also find authority for the following propositions: To free a slave is a perfectly lawful act, but to free a slave from motives of ill will (*vindicta*), in order to defeat another of his right to have an account rendered by the

[1] 1898, A.C. 1.
[2] 2 E. & B. 216.
[3] 6 Q.B.D. 333.
[4] 107 Mass. 555.
[5] 14 S.C. Rep. 240. *Van Horn* v. *Van Horn*, 28 Atl. Rep. 669.
[6] "Qui servo persuasit ut fugeret, fur non est."—*Dig.* 47, 2, 36.
[7] "Cum quis persuaserit familiæ meæ ut de possessione decedat, possessio quidem non amittitur, sed de dolo malo judicium in eum competit, si quid damni mihi accesserit."—*Dig.* 4, 3, 31.

slave, is actionable (*Dig.* 4, 3, 32[1]). Here there is no contract by the slave to render accounts. Again, it is actionable to deprive a man of the opportunity of selling goods by asserting an unfounded claim to the ownership of them (*Dig.* 4, 3, 33[2]). This is very like our slander of title (cf. *Green* v. *Button*[3]). These are instances of a much wider principle, having nothing to do with master and slave.

To prevent a promisor from carrying out an existing contract by destroying the subject matter was actionable at the suit of the promisee (*Dig.* 4, 3, 18, 5[4]; *Dig.* 4, 3, 19[5]). The reasons for so holding—namely, because the liability on the contract was discharged—are suggestive, and seem to imply that if the liability on the contract still subsisted, the action for preventing its performance would not lie (cf. *Dig.* 47, 2, 13,[6] and 14[7]). Moreover, it may be doubted whether to persuade a free man to break a contract or do any other wrongful act was actionable by the Roman law (see, for example, *Dig.* 9, 2, 37[8]). For these reasons we may, perhaps, conclude that *Lumley* v. *Gye* and *Bowen* v. *Hall* would not be decided by the Roman as they have been by the common law.

With regard to the doctrine of *Allen* v. *Flood*, we have seen that by the Roman law an innocent act may become actionable if done from motives of ill will. The cause of action alleged in *Allen* v. *Flood* might therefore be held to lie by the Roman law, if in any case an action would lie for merely inducing a free man to do an act, however wrongful. But as this is very doubtful we may conclude that *Allen* v. *Flood* would probably be decided by the Roman as by the common law, but upon different grounds.

[1] "Filius legatum sibi servum per præceptionem, rogatus manumittere post certum tempus posteaquam rationes ipsi et coheredibus fratribus reddidisset, ante diem et ante redditas rationes ad libertatem *vindicta* manumittendo perduxit; quæsitum est an ex fideicommisso fratribus tenetur ut rationes eorum pro portionibus redderet? Respondi cum liberum fecisset ex causa quidem fideicommissi non teneri; verum si ideo properasset manumittere ne rationes fratribus redderet posse de dolo actionem in eum exercere."—*Dig.* 4, 3, 32.

[2] "Rei quam venalem possessor habebat, litem proprietatis adversarius movere cœpit, et, posteaquam opportunitatem emptoris cui venumdari potuit peremit, destitit, placuit hoc nomine actionem in factum sua indemnitate competere."—*Dig.* 4, 3, 33.

[3] 2. C.M. & R. 707.

[4] "Si servum quem tu mihi promiseris alius occiderit, de dolo malo actionem in eum dandam plerique recte putant, quia tu a me liberatus sis, ideoque legis Aquiliæ actio tibi denegabitur."—*Dig.* 4, 3, 18, 5.

[5] "Si fidejussor promissum animal ante moram occiderit de dolo actionem reddi adversus eum oportere Neratius Priscus et Julianus responderunt; quoniam debitore liberato per consequentias ipse quoque dimittitur."—*Dig.* 4, 3, 19.

[6] "Is cui ex stipulatu res debetur, furti actionem non habet, si ea subrepta sit, cum per debitorem stetisset quominus eam daret."—*Dig.* 47, 2, 13.

[7] "Eum qui emit, si non tradita est ei res, furti actionem non habere, sed adhuc venditoris esse hanc actionem, Celsus scribit. Mandare eum plane oportebit emptori furti actionem, et condictionem, et vindicationem."—*Dig.* 47, 2, 14; *cf.* also *Dig.* 18, 1, 35, 4.

[8] "Liber homo si jussu alterius manu injuriam dedit, actio legis Aquiliæ cum eo est qui jussit si modo jus imperandi habuit; quod si non habuit cum eo agendum est qui fecit."—*Dig.* 9, 2, 37.

SUICIDE AS A CRIME.

[*Contributed by* EDWARD MANSON, ESQ.]

AMONG primitive communities suicide is a less common phenomenon than it is in an over-civilised or decadent age, when the burden of a complex life grows heavier and when that "detestable thing reflection," as Rousseau calls it, has begun to assert itself. But in every community—primitive, mature, or decadent—there will be moods of mind which neutralise the instinctive love of life and persuade to self-destruction. It is an observation of Lord Bacon that there is no passion in the mind of man so weak but it mates and masters the fear of death. "Revenge triumphs over death; love slights it; honour aspireth to it; grief flieth to it; fear preoccupieth it": nay, simple ennui—niceness or satiety—is sufficient. Men have taken their lives upon a mere weariness to do the same thing so oft over and over. "Why should I endure," the overwrought soul in such cases asks of itself in the words of Seneca, "the agonies of disease and the cruelties of human tyranny when I can emancipate myself from all my torments and shake off every bond?"—with a bare bodkin! To try to find a deterrent, a countervailing motive to this specious logic of self-emancipation, something which will turn the scale when a Cato's mind is poised between the dagger and the *Phædo*, has been the constant endeavour of philosophers, ecclesiastics, and legislators; and such endeavours and the sanctions they have begotten form a curious and instructive chapter in historical and comparative law. The question goes deep—for in a nation's view of suicide is reflected its whole conception of life.

Greek Views.—The ideas of the Greek thinkers Pythagoras, Plato, and Aristotle may be summed up under two heads, the religious and the political:

"Vetat Pythagoras injussu imperatoris, id est, Dei de præsidio et statione vitæ decedere."—*Cic de Senect.* xx.

This may be called the sentinel view of life, and it is adopted by Plato.

Says Cebes in the *Phædo*:

"'It seems wonderful to me, Socrates, that when it is better for a man to die he is not allowed (μὴ ὅσιον ἔστι) to be his own benefactor, but must wait for some one else to do him the kindness.' 'Not so unreasonable,' says Socrates

'we men are in prison, as it were, and must not open the door and run away. This is the truth in a mystery; besides, we are the property of the gods (ἐν τῶν κτημάτων τοῖς θεοῖς), are we not?—not our own.'"

Ethically, too, according to Plato, suicide argues a want of ἀνδρεία: it is an act of flight, and as such an act of cowardice—an abandonment of duty. "What shall he suffer," says Plato in the *Laws*—Utopian, of course—"who slays him who of all men, as they say, is his own best friend: I mean the suicide?" Such an one is to be buried alone, buried ingloriously, in uncultivated and nameless land, and no column or inscription is to mark the place of his interment. Both these views—the religious and the ethical—have deeply coloured modern sentiment on the subject.

Aristotle's disapproval of suicide is conceived, as we might expect, from the civic rather than the religious point of view. The State claims us, and as citizens we may not, without its sanction, renounce our allegiance. This is the sentinel idea again from the secular standpoint. These views of cultivated Paganism found recognition in Greek law to this extent, that the State affixed infamy to the deed. In Æschines' *Ctesiph.*, s. 64, it is mentioned that the hand of a suicide was buried apart from himself; but beyond this general stigma Greek law does not seem to have gone.

Stoicism and Roman Law.—The Romans, we might have expected, would have severely condemned suicide, not only from their strong sense of civic duty, but as repugnant to that "virtus" which was the basis of whatever was best in the Roman character; but as a matter of fact neither Roman sentiment nor Roman law censured suicide. A man was lord over his own life, and could lawfully bring it to an end according to his own free determination. In this respect both the schools of thought which divided cultivated Romans—Epicureanism and Stoicism—arrived at the same conclusion, though by different roads. Happiness was, to the Epicurean or Cyrenaic, our being's end and aim. If happiness was unattainable by reason of any of the ills that flesh is heir to, suicide was the natural and logical remedy: "Si tolerabiles sint dolores feramus, sin minus, æquo animo e vita cum ea non placet exeamus": just as we would leave a room when it smoked (Seneca) or a theatre when we were tired of the play:

> "Four acts are done, the jest grows stale,
> The waning lamps burn dim and pale,
> And reason asks, 'Cui bono?'"[1]

Stoicism struck a "nobler and a manlier strain." As expounded by such men as Seneca, Epictetus, and Marcus Aurelius, its moral philosophy is the high-water mark of Paganism. It embodied a principle of aspiration, of

[1] Seneca, the enthusiast of suicide, declares that he who waits the extremity of old age is not far removed from the coward, just as he who drains the flask to the very dregs is rightly regarded as too much addicted to wine.

moral energy, of a life above all ordinary pleasures and interests which is worthy of the highest praise. There are pieces of the Stoic doctrine, as Sir Thomas Browne says, which, delivered in a pulpit, might well pass for current divinity. How came it, being of this fine moral fibre, to become the exponent, *par excellence*, of suicide—particularly Roman Stoicism? The answer is not far to seek. The leading maxim of Stoicism was to live "according to nature"—according, that is, to "right reason." How could a man live according to right reason if his body was distempered by disease, his reason decayed or doting, his better will coerced by a political tyranny like that of a Tiberius or a Nero—perhaps crushed by cruel tortures? To evils such as these suicide (ἐξαγωγή)—the "ushering himself out of life"—presented itself to the Stoic, especially to the proud spirit of the Roman Stoic, as a welcome deliverance[1]—indeed, as the only course consistent with the sage retaining his self-respect. Add to this the universal *dégout de vie* which set in under the Empire, and which pressed most on the noblest spirits of the age:

> "On that hard Roman world disgust
> And secret loathing fell
> Deep weariness and sated lust
> Made human life a hell"

and inclination and duty alike pointed to the relief of death.

The toleration of Roman philosophy was reflected in the law. Suicide in a soldier was indeed punished as desertion by Hadrian; but in a citizen it was allowed. "Si quis impatientia doloris aut tædio vitæ aut morbo aut furore aut pudore mori maluit, non animadvertatur in eum," sums up Roman law. But Roman law drew a distinction as to the reasonable grounds for suicide: some things would justify it, others would not. Thus weariness of life, incurable illness,[2] disgrace,[3] bereavement, hopeless poverty, wounded pride were accepted as sufficient, but not the fear of condemnation, the anticipation of the just sentence of the law from cowardice or guilt. Yet even here the earlier law respected the right of the accused to dispose of

[1] "Ubique mors est: optime hoc cavit Deus."—Seneca.

"La tyrannie des empereurs fit du suicide une affreuse nécessité."—M. Bourquelot.

A French gentleman quoted by Boissier tells us that he found the moral letters of Seneca tedious until the Reign of Terror came, and then being in daily peril of his life he understood their searching power.

[2] Sir Thomas More in his *Utopia* says that there the priests and magistrates did use to exhort men afflicted with incurable diseases to kill themselves, and that they were obeyed as the interpreters of God's will; but they who killed themselves without giving an account of their reasons were cast out unburied.

[3] Contrast Dr. Johnson's robust view:

"'Suppose, sir,' said Boswell, 'that a man is absolutely sure that if he lives a few days longer he shall be detected in a fraud, the consequence of which will be utter disgrace and expulsion from society?'

"*Johnson:* 'Then, sir, let him go abroad to a distant country: let him go to some place where he is *not* known. Don't let him go to the devil, where he *is* known.'"

his life, and for a good reason—viz., that under the first emperors the great families of Rome were constantly being destroyed by criminal prosecutions, and to forestall a tyrant was no absconding from justice. In the words of Tacitus (*Ann.* vi. 25), "Qui de se statuebant, humabantur corpora, manebant testamenta—pretium festinandi." But the avarice of Domitian barred this way of escape by ordaining that a voluntary death intervening, in the case of a capital offence, between the accusation and the sentence, should be treated as a confession of guilt, and the property of the accused be seized; and this ordinance is embodied in the Code of Justinian.[1]

The attitude of Roman law towards suicide is really the reflection of that hardness of the Roman nature which, disciplined under the Republic, became heroic and conquered the world, but which degenerated under the Empire into a ruthless indifference to human life.

Primitive Christianity.—In this worn-out Roman world, with its rank growths of Epicureanism and sterile soil of Stoicism, there blossomed the ideals of a nascent Christianity. Life was to the Christian a pilgrimage, a period of probation, of discipline. "Prosperity," as Bacon says, "is the blessing of the Old Testament, adversity of the New." Pain and suffering was therefore to the Christian not only not an evil, as it was to the Stoic, but a good—part of the salutary discipline of life to be lived through and profited by. "It is a brave act of valour," says Sir Thomas Browne in his *Religio Medici* (p. 65), "to contemn death; but where life is more terrible than death it is then the truest valour to dare to live; and herein religion hath taught us a noble example: for all the valiant acts of Curtius, Scævola, or Codrus do not parallel or match that one of Job." On this principle it was wrong, so the Church taught, to court martyrdom, as the early Christian enthusiasts were too fond of doing, or to fly to death to escape persecution (St. Jerome). It was wrong for a woman to kill herself even to save her chastity (St. Augustine).[2]

The Mediæval Church.—This view of life as a moral discipline changed for Christendom the whole perspective of suicide: this and the superior certainty with which the Church affirmed the doctrine of a future life.[3]

[1] "Eorum demum bona fisco vindicantur qui conscientiâ delati admisstique criminis metuque futuræ sententiæ manus sibi intulerint. Ea propter fratrem vel patrem tuum si nullo delato crimine dolore aliquo corporis aut tædio vitæ aut furore aut insaniâ aut aliquo casu suspendio vitam finisse constiterit bona eorum tam ex testamento quam ab intestato ad successores pertinebunt" (ix., 1.).

Conf. id. vi., xxii.: "Quod si futuræ pœnæ metu voluntaria morte supplicium ante venit ratam voluntatem ejus conservari leges vetant."

[2] It is worth noting how St. Augustine here discountenances the exaggerated honours paid to St. Pelagia and other virgin suicides: grasping the higher truth that no force can take away the purity of the soul.

[3] Mahommedanism is at one here with Christendom. The Koran expressly condemns suicide: "Neither slay yourselves: for God is merciful towards you; and whoever doth this maliciously and wickedly, He will surely cast him to be broiled in hell fire."

But the Church was not content, unfortunately, to rest its condemnation of suicide on this ethical principle of a heroic patience, on the sacredness of life, or on theological grounds like those of St. Thomas Aquinas.[1] It found, in the words of the sixth of the Mosaic commandments, "Thou shall not kill," an implicit divine prohibition of suicide; the Everlasting had in them "fixed his canon 'gainst self-slaughter." Suicide was a form of homicide: "Non occides—non alterum: ergo nec te" (St. Augustine, *De Civitate Dei*).

"His exceptis quos vel lex justa generaliter vel ipse fons justitiæ Deus specialiter occidi jubet quisquis hominem vel se ipsum vel quemlibet occiderit homicidii crimine innectitur" (St. Augustine, *De Civitate Dei*, c., xxiii.; *Quæst. v. Cap. apud Jo., Pet. Gibert*, j. 163). "Non frustra in Sanctis Canonicisque Libris nusquam nobis Divinitus præceptum permissum ve reperiri potest ut vel ipsius adipiscendæ immortalitatis vel ullius curandi cavendique mali causâ nobismet ipsis necem inferamus: nam et prohibitos nos esse intelligendum est ubi Lex ait 'Non Occides'" (*ibid.*).

Henceforth suicide was not merely a dereliction of duty, a rebellion against God, but was branded as self-murder—the word which to this day describes in Germany the act of suicide (*selbst-mörder*). The religious sentiment of the Church on the subject and its interpretation of the Mosaic prohibition were as yet, however, in St. Augustine's time, only pious opinions. The Justinian and Theodosian Codes show no trace of the influence of Christian ideas in the matter of suicide; the Pagan legislation remains unaltered. But the Church was slowly but surely formulating its own law and its ecclesiastical sanctions on this as on other subjects. A Council of Arles, in the fifth century, pronounced suicide to be the effect of diabolical possession, and in the following century a Council of Braga in A.D. 561 ordained that no religious rites should be celebrated at the tomb of the culprit, and that no masses should be said for his soul. The suicide's fate was to be that of those

> "Who, having died in mortal sin,
> Might not be laid the Church within."

These ordinances were repeated by later councils, and were gradually introduced into the laws of the barbarians and of Charlemagne. St. Louis originated the custom of confiscating the property of the dead man, and the corpse was soon subjected to gross and various outrages. In some countries, as Mr. Lecky tells us, it could only be removed from the house through a perforation specially made for the occasion in the wall; it was dragged upon a hurdle through the streets, hung up with the head downwards, and at last thrown into a public sewer, or burnt, or buried in the sand below high-water mark, or transfixed by a stake in the public highway.

[1] St. Thomas condemns suicide on three grounds: (1) As contrary to charity; (2) As a crime against the *Civitas Dei*; (3) As a usurpation of the rights of God.

In sanctioning these outrages the Church was no doubt actuated by a devout horror of the sinfulness of suicide; but it was also the policy of the Church—possibly a wise policy—to invest suicide with supernatural terrors as the only effective sanction in a rude age. The barbarian races who overran the Roman empire and founded kingdoms on its ruins were not attracted to suicide by the arguments of philosophy or the sense of ennui, but they had their own solicitations to it in a highly tempered courage which disdained death. Man, woman, and child among these free nations all preferred death to slavery or dishonour, and frequently had recourse to it. Abundant examples may be cited from the records of Goths, Franks, Gauls, and Visigoths. To these suicidal impulses—sometimes epidemic—the superstitious sanctions of the Church administered a salutary check.

Modern Ideas: England.—It was inevitable that with the break up of the mediæval system and the spread of philosophic thought in the seventeenth and eighteenth centuries a change of sentiment on the subject of suicide should come, and with it a modification of the law. England, owing to its insularity and conservatism, was more slow in feeling the effects of the movement than continental nations. Mediævalism, indeed, still lingers with us. The common law had early adopted the view of the canon law that suicide was self-murder, and given this premiss a person who, being *compos mentis*, killed himself became by the simplest logic a *felo de se*.[1] The reasons alleged by Hale and Plowden are that the king hath lost a subject, that his peace is broken, and that it is of evil example; but as no punishment could reach the dead, all the law could do on a verdict of *felo de se* was, following the sanctions of the canon law, to inflict indignities on the senseless corpse (it was to be buried at midnight, in a highway at cross roads, with a stake through it, and without Christian rites), and to forfeit the goods and chattels of the culprit.[2] We have changed that now.

Forfeiture for felony was abolished in 1870, and the indignities to the corpse are so far modified by the Acts of 1823 and 1882 that it may now be buried either silently or with such Christian and orderly religious service at the grave as the person having charge of the body thinks fit. But the most significant change is in the attitude of coroners' juries at the present day—their persistent refusal to brand the suicide as a murderer and a felon. Hawkins in his *Pleas of the Crown* (1724) takes notice of what he calls "a strange notion which has unaccountably prevailed of late that every one who

[1] "Suicide," as Sir James Stephen observes in his *History of the Criminal Law*, "is held to be murder so fully that if two lovers try to drown themselves together, and one is drowned and the other escapes, the survivor is guilty of murder." But as regards attempts, our law abates somewhat of its stern logic. An unsuccessful attempt to commit suicide is not punishable as an attempt to commit murder within 24 & 25 Vict., c. 100, s. 15, but as an indictable misdemeanour triable at Quarter Sessions, and punishable by fine and imprisonment (*R.* v. *Burgess*, 1862, 32 L.J.M.C. 55).

[2] But the blood of a *felo de se* was not corrupted, nor his lands of inheritance forfeited.

kills himself must be *non compos* of course[1]: for it is said," he goes on, "to be impossible that a man in his senses should do a thing so contrary to nature and all sense and reason. If this argument be good, self-murder can be no crime, for a madman can be guilty of none; but it is wonderful that the repugnancy to nature and reason which is the highest aggravation of this offence should be thought to make it impossible to be any crime at all which cannot but be the necessary consequence of this position, that none but a madman can be guilty of it. May it not with as much reason be argued that the murder of a child or of a parent is against nature and reason, and consequently that no man in his senses can commit it? Has a man therefore no use of his reason because he acts against right and reason? Why may not the passions of grief and discontent tempt a man knowingly to act against the principles of nature and reason in this case as those of love, hatred, and revenge, and such like are too well known to do in others?" All this is quite true. What Hawkins did not see is that when coroners' juries treat the act of suicide as conclusive evidence of mental unsoundness, they are not bringing in a candid verdict, but are merely evading the artificial doctrine of constructive murder, and illustrating thereby how a law overstrained defeats itself.

The Draft Penal Code of 1879 in its definition of homicide excludes suicide. At the same time it makes attempts to commit suicide punishable with two years' imprisonment with hard labour, and abetment of suicide with penal servitude for life.

India.—In India the Penal Code punishes abetment of suicide severely (Arts. 305 and 306), and attempts to commit suicide with simple imprisonment for a term which may extend to one year or with fine or both (Art. 309).[2]

France.—In France the Revolution swept away the mediæval law, and the would-be regenerators of society in their passion for liberty accorded every man the liberty—among other things—of taking his own life; and this liberty still exists in the France of the present day: the law does not punish suicide. Whether it ought to do so or not has been much debated by French *criminalistes*, "et l'on a soutenu que l'obligation de conserver son existence ne constitué pas seulement un devoir envers soi-même et envers Dieu qu'elle ne relève pas uniquement de la loi morale, mais qu'elle est socialement exigible, puisque d'une part le suicide blesse la justice absolue et que d'autre part la société a le plus grand interêt à ne pas perdre un de

[1] "*Boswell*: 'Do you think, sir, that all who commit suicide are mad?'

"*Johnson*: 'Sir, they are often not universally disordered in their intellects, but one passion presses so upon them that they yield to it and commit suicide as a passionate man will stab another.'"

[2] It is said to be very common in India for native women of all ages to throw themselves into wells on the merest momentary impulse of passion, excited generally by the most trifling causes—such as an unexpected reprimand, a thwarted wish, the colic, etc The relatives of such persons are at times unjustly harassed by the police as the alleged instigators of the offence.

ses membres et à ce que cet effroyable exemple dont la contagion est particulièrement contagieuse ne sois pas suivi." The inclusion of suicide among delicts would have the advantage, these jurists argue, of inculcating a fine lesson—a moral *avertissement* for the people; and who knows but what such salutary branding of suicide might not deter some momentarily distracted spirits from committing it? The difficulty which presents itself to French —and to most modern jurists—is to know what punishment to pronounce against the author of suicide. A man who takes away his own life, "se derobe à la repression, et la loi doit s'arrêter devant un cadavre." On this principle modern French law forbids proceedings against the corpse or the memory, and it has justly put an end to the general confiscation of goods, which hurts the family rather than the culprit.

Germany.—In Germany, in the Middle Ages, as in Christendom generally, ignominious burial was the regular punishment for suicide. A change in sentiment took place in the eighteenth century under the influence of Montesquieu and Voltaire; and since the Bavarian Statute of 1813 punishment for suicide has disappeared from the law books. Neither suicide nor attempted suicide constitutes a criminal offence. Instigation to or abetment of suicide stands on a different footing, and is punishable in Germany, as it is in Hungary, Holland, Russia, Japan, England, and America.

Italy.—In Italy the same distinction obtains. Under the Criminal Code of 1889 no punishment is ordained for suicide or attempted suicide; but any one instigating another to commit suicide, or aiding and abetting suicide, is liable, if death ensues, to imprisonment from two to nine years.

America.—In America suicide is not, practically, an offence. At common law, as in England, it is felony; but as no penalty other than the forfeiture of goods—which was the common law punishment—can be inflicted on him who has murdered himself, and as forfeitures for crime are not practised in any states, the offence is not punishable. "Yet we recognise it as criminal," says a well-known American jurist, "whenever the opportunity arises indirectly, as when one advises another to kill himself. The view that men are naturally entitled to end their own lives at pleasure accords neither with our instincts nor with our better reason." The special ground taken up in America seems to be that suicide is an offence against population —against all who compose the State—since it deprives each of a support on which he is entitled to rest. For it is neither possible nor desirable that men should be independent of one another (Bishop, C.L., s. 510).

The Modern Sanction—To sum up: all civilised nations now condemn suicide on one ground or another, either as an act of moral cowardice, or of rebellion against God, or of disloyalty to State or sovereign, or as a desertion of a man's family. All feel, too, that a deterrent is needed; but the trend of modern sentiment and legislation is to trust for this deterrent not to such rude sanctions as forfeiture or ignominious burial, but to their modern

equivalent, the disapprobation of society—the "infamy" of the old Greeks —and to exclude simple suicide, as distinguished from attempts to commit or abetment, from the sphere of positive law; in other words, to concede it legal impunity. Such a quasi-sanction as the disapprobation of society, the reprobation of right-feeling men, may prove—is sure indeed to prove at times—inadequate to deter; but so did the older sanctions: for a man who is bent on suicide—in the French phrase, "se derobe à la repression"—no ordinary motives can weigh with him. Nevertheless, it seems the only deterrent consistent with modern sentiment which can be resorted to without inflicting injustice on the family and friends of the suicide. On the other hand, the treatment by Anglo-American law of suicide as a crime, albeit a crime practically without a sanction, has an educational value. Its prohibition speaks with all the authority that comes from the "voice of the recorded law."

It is curious to note how here as elsewhere the Penelope's web of positive law is being perpetually unravelled, while duties once of moral obligation only are being taken up and woven into the fabric.

SECRET COMMISSIONS ACCORDING TO THE LAW OF GERMANY.

[*Contributed by* ERNEST SCHUSTER, ESQ.]

THERE are no general provisions about "secret commissions" in the German Criminal Code The following provisions relating to special cases may, however, be of interest in this connection:

1. PROVISIONS RELATING TO OFFICIALS.

The acceptance of a secret commission on the part of an official in the service of the Empire or of any German state would constitute an offence under ss. 331, 332, and 333 of the Criminal Code. It is provided by these sections that:

(*a*) An official who, in consideration of any act done in the course of his employment and not in itself constituting a violation of his duties, accepts, demands, or obtains the promise of any gift or other advantage is guilty of an offence punishable by a fine not exceeding three hundred marks or by imprisonment for a period not exceeding six months.

(*b*) Where the act in consideration of which a gift is made, demanded, or promised constitutes a violation of the official's duties, the maximum punishment is penal servitude for five years.

(*c*) The person making or offering the gift in case (*a*) is not guilty of any offence; in case (*b*) his maximum punishment is five years' imprisonment.

The expression "official" includes persons employed permanently or temporarily in the service of the Government, or of any local government authority. It does not include solicitors or advocates, but it includes public notaries (see s. 359).

As both the Empire and states and also municipal corporations in Germany carry on manifold and important trading enterprises—railways, banks, factories, gas, electrical and water works, etc., etc.,—these provisions cover a fairly large ground.

It is a matter of evidence in each case whether the gift was accepted or made with reference to any particular official act. Gifts made to an official in accordance with general custom (*e.g.*, New Year's gifts, etc.), or in consideration of some act not forming part of the donee's official

duties, or in compliance with the usual forms of hospitality or from motives of personal friendship, are not subject to the above-mentioned provisions (see *Liszt, Strafrecht*, 6th edition, p. 519).

2. Provisions Relating to Agents, Trustees, etc.

It is provided by s. 266 of the Criminal Code that persons belonging to any of the following classes, and doing any of the following things, are guilty of an offence punishable by imprisonment for a period not exceeding five years:

(*a*) Guardians, trustees, receivers, persons acting as trustees in any bankruptcy matter, executors and managers of charitable trusts, if by any act or omission they wilfully injure the interests of, or inflict any damage on, any person or thing committed to their care.

(*b*) Persons having authority to collect debts or to realise any property, who in the course of such collection or realisation wilfully injure the interests of their principals.

(*c*) Surveyors, auctioneers, brokers, etc., and other persons carrying on their profession or trade under a government or municipal licence, who in the course of any transaction entrusted to their care wilfully injure the interests of the persons for whom they are acting.

In any of the three cases a fine not exceeding three thousand marks may be imposed, in addition to the imprisonment, if the offence was committed with the intention of obtaining a pecuniary benefit. In a similar way s. 249 of the German Mercantile Code (s. 312 of the New Mercantile Code, which will come into force on January 1st, 1900) provides that managers, directors, and liquidators of companies are guilty of an offence punishable with imprisonment for a period not exceeding five years and a fine not exceeding twenty thousand marks if by any act or omission they wilfully injure the interests of their company.

The expression "wilfully" (*Absichtlich*) in all these provisions does not necessarily imply that there must be an intention to injure. It is sufficient that the act or omission is done or caused with the knowledge that the person or company concerned will be injured thereby (see *Liszt, ubi supra*, p. 428, and the cases quoted in Rüdorff's edition of the Criminal Code, sub-s. 266).

It is therefore clear that in many cases the acceptance of secret commissions by trustees, brokers, directors, etc., would constitute a criminal offence under the above-mentioned sections.

With reference to both classes of provisions which I have mentioned, it may be useful to point out that German codes as a rule lay down general principles without enumerating individual instances. The fact that the sections which I have quoted show a marked departure from that rule tends to prove that it was found impossible or inexpedient to establish such a general principle with reference to the subject in question.

THE PROPOSED PENAL CODE FOR JAPAN.

[*Contributed by* W. F. Craies, Esq.]

The efforts of Japan to pass from the status of an Asiatic empire to that of a power recognised as on an equality with the Western family of nations have during the last few years been attended with marked success. In the Chino-Japanese war the progress of Japan in the modern arts and methods of war was made evident; and the international rules of European naval war were carefully studied and diligently adopted, if not developed, as will sufficiently appear to those who have read Mr. Takahashi's collection of the cases which arose during the war (Clarendon Press, 1899). At present Japanese statesmen are engaged in the work necessary to prepare for the abolition of the system of capitulations, hitherto found necessary in dealing with Eastern powers, which involve the concession of extra-territorial jurisdiction in causes criminal as well as civil over the subjects of the powers with which the capitulations are in force; and so far at least as Great Britain and the United States are concerned, Japanese jurisdiction over the subjects of these powers in Japan will very shortly be as complete as over Japanese subjects. This change of treatment renders it necessary in the interests of Europeans to ascertain the nature of the local law to which they will be subjected, and the kind of justice which they may expect to get in Japanese courts. A Code of Criminal Procedure which seems not to be readily accessible in England has already been passed and promulgated; and a Penal Code has been prepared of which Mr. de Becker has made an English translation (Yokohama, 1899, *Eastern World* Office), from which it is possible to judge the probable effect on British subjects of subjection to Japanese law. The code has not yet been passed by the Diet; but its previous publication is beneficial as affording opportunity for consideration and amendment, and, where necessary in British interests, for diplomatic representation. From internal evidence we should say that the draft, if not made in Germany, was modelled on the German Penal Code of 1870. Art. 3 of the Japanese draft runs: "The law is applicable to all offences committed within the borders of the Empire, irrespective of whether the perpetrator be a native or an alien"; and to offences on Japanese ships on the high seas and to piracy *jure gentium*. The part within inverted commas is almost a literal transcript of Art. 3 of the German Code; and Art. 4, which renders punishable in Japan foreigners

as well as natives who abroad commit felonious acts against Japan or its people, repeats the somewhat exceptional provision of the German Novella of 1876; while Art. 7 varies from English law (see *Re. Hutchinson* 1 *Leach* 135) and accords with German law in treating conviction for the offence abroad as no bar to trial in Japan, and as only ground for mitigation of punishment.

The scale of punishments resembles that of Germany; but the mode of capital punishment is by hanging, as in England and the United States, and not by decapitation, as in Germany; while the terms of penal servitude seem to have been calculated by reference to British rather than German precedent. S. 4 of the second chapter deals with prescription on German lines; while Chs. III. and VIII. deal with exemptions and legal excuses and extenuating circumstances, and Ch. IV. with attempts to commit crime in a manner distinctly modern, with no savour of Asiatic prejudice. And when reference is made to the substantive offences proposed for punishment under the Code, it will be found that their definition gives little or nothing to be objected to by Europeans, though whether it be the defect of the original or the translator we think that there will be ample opportunity for legal argument by Japanese lawyers as to the effect of some of the articles. The titles relating to perjury, forgery, theft, and destruction of public roads and waterways are much simpler and apparently quite as effectual as those of our law; while those as to desecration of temples and the bodies of the dead are an improvement on English precedent. With respect to homicide, we think the translator must be in error; for Art. 257 infers penal servitude for "killing" another without any qualification. But Art. 269 deals with involuntary homicide by negligence, and it must be assumed that it is not intended to punish involuntary homicide unless it arises from negligence or in the commission of another crime. Cases such as the Wark case are covered by Art. 272, which provides that where death of a woman is caused by abortion the offender may be dealt with as for wounding or grievous bodily harm, and not as for direct homicide.

One further point needs notice: that under the title "libel," injury to the reputation of the dead is indictable where it arises in consequence of a false accusation *made before a judicial tribunal*; and that slander in certain cases is *indictable*. And justification of defamatory statements within the scope of this part of the Code appears not to be permitted. Adultery, even by a wife, is made criminal, as in India and many Continental States.

This brief account of the nature of the draft code will on the whole be reassuring to Britons likely to fall under it; but beyond a doubt the legal advisers of the Foreign Office ought to carefully examine the whole code with the aid of the existing consular tribunals in Japan, and by reference to the Procedure Code, so as to guard so far as may be against possible difficulties and injustice when the code is passed and comes into operation.

NOTES.

Circular Despatch by the Colonial Office.—The Secretary of State for the Colonies has been good enough to issue the following circular despatch relative to the work of the Society of Comparative Legislation. This is not the only debt of gratitude which it owes to the Colonial Office, whose cordial approval and co-operation have greatly assisted in furthering the objects of the Society.

"*Downing Street,*
"*21st March,* 1899.

"*Sir,*

"*Referring to my Circular despatches of the 20th July and 3rd October,* 1895, *I have the honour to inform you that the Society of Comparative Legislation, which has already done valuable work in collecting information on legal subjects, is extending its operations, and has secured the services of Mr. John Murray as the publisher of its Journal, which will now be issued in an improved form.*

"2. *I am anxious, as you are already aware, to do everything which may be possible to facilitate the work of the Society, and at their request I have arranged that they shall be furnished with a copy of every Colonial enactment as soon as it is received by this Department. In forwarding copies of such enactments I shall be glad if you will bear this additional requirement in mind.*

"3. *It has also been suggested to me that a half-yearly report by the Law Officers of the Colonies on the decisions by Colonial Courts on points of law of special interest would be of service to the Society as well as to this Department; and I would ask you to consider with your legal advisers whether this suggestion is practicable, and, if so, how it can best be carried out.*

"*I have the honour to be,*
"*Sir,*
"*Your most obedient, humble Servant,*
"J. CHAMBERLAIN."

"*The Officer Administering*
the Government of

Need of Co-operation.—The editors of the *Journal* take the opportunity of the issue of a second number for 1899 to make another appeal to all persons interested in the work of the Society to co-operate. It is only by such co-operation, as has been already pointed out, and by the interchange of information and ideas which it secures, that the objects of

the Society can be adequately accomplished and any advance be made towards an assimilation of the varied systems of law which make up the British empire. The following are some of the ways in which it is suggested that help can be rendered:

1. By supplying copies of law reviews and periodicals, or extracts therefrom, to the editors of the *Journal*.
2. By communicating particulars of (*a*) pending legislation, (*b*) important decisions of the Superior Courts.
3. By furnishing reports or notes of lectures or addresses dealing with matters of interest to jurists.
4. By contributing original notes or articles on topics of comparative law or legislation.
5. By collecting evidence of important native customs.

Uniformity in the Publication of Statutes.—It would be a great advantage if uniformity could be secured in the published form of colonial statutes. At present the greatest diversity exists. The statutes of the United Kingdom are published in one size, while each several colony and dependency chooses its own, though, speaking generally, the sizes fall—approximately—into six classes. The consequence is not only a want of scientific method, but a heterogeneous collection of documents, which, when bound, librarians find highly inconvenient for shelving. This is a matter which might easily be rectified by an arrangement between the different parts of the Empire, and it is to be hoped that the Colonial Office may take the step of addressing a circular to the Colonies inviting their co-operation in fixing a uniform standard of publication. Mr. A. F. Etheridge, the librarian of Lincoln's Inn Library, who has gone carefully into the question, gives it as his opinion that an octavo printed on paper measuring when folded for binding $10 \times 6\frac{1}{2}$ would be the most convenient size. Uniformity should not, however, stop at size; it should extend to all the mechanical parts of the drafting—to the numbering and title of statutes, to the marginal notes, the mode of reference, chronological tables of Acts, the position of interpretation and repeal sections, continuous pagination for a year or *session of Parliament*, and the indexing of the year's legislation. The commencement of a new century seems a specially appropriate time for inaugurating such a reform. One difficulty which is met with in the case of the Crown Colonies and Protectorates is that much of the legislation in such cases is effected by orders in council and proclamations printed in the Government *Gazette*. At present the printing of the *Gazette* often bears no relation to the size or form of the other Acts or ordinances of the colony or Protectorate. By a simple arrangement—a correspondence between the type and width of column of the *Gazette* and of the Acts—this inconvenience might be obviated, and proclamations, Orders in Council, and rules of court might be reproduced in the size of the Acts and published with them. In these days, when so

much is done by Orders in Council and rules and orders made under statutory authority, it is necessary that such subsidiary legislation should be made accessible by being brought together. English lawyers know by experience the bewilderment begotten of scattered rules and orders: "This way madness lies."

Reciprocity in the Admission of Solicitors.—The Colonial Solicitors Bill is a step, and an important one, towards the consolidation of the legal profession all over the Empire by facilitating reciprocity in admission to professional practice. There exist Acts relating to the admission of English solicitors in the colonies and of colonial solicitors; but these Acts are almost unworkable; and with one important colony at least not a little friction has arisen. The present Bill, which is promoted by the Incorporated Law Society, aims at establishing a judicious system of reciprocity. The Vice-President of the Society (Mr. Manisty) thus sketches its provisions in a communication with which he favours us: "When in any British possession the regulations respecting the admission of solicitors to its Superior Court are such as to secure that those solicitors possess proper qualifications and competency, and where also by the law of the British possession solicitors of the Supreme Court will be admitted to be solicitors of the Superior Court there on terms as favourable as those on which it is proposed to admit solicitors of that Superior Court to be solicitors of the Supreme Court here, an order in council can be obtained that the Act shall apply to such possession. Where an order in council has been obtained a solicitor of a Superior Court in a British possession to which the Act applies may, on giving due notice and the prescribed proofs of his qualifications and good character, and either on passing the prescribed examination or in the prescribed cases without examination, and either after service of articles of clerkship during the prescribed period or in the prescribed cases without such service, be admitted a solicitor of the Supreme Court on payment of the prescribed amount in respect of stamp duties and fees. It will be seen that the language used is wide enough to enable a satisfactory arrangement to be made with each and every colony. It may be that in some cases the colony would wish that the English solicitor should, before being admitted in the colony, show some knowledge of laws existing there which do not exist in England, and equally it might be found here desirable to arrange that solicitors of some particular colony should show some knowledge of laws existing here, but not existing in the colony; but if the Bill passes, it is not anticipated that any difficulty will arise in arranging equitable reciprocity. This of course will be to the advantage of colonial solicitors wishing to come "home" and practise here, and equally to the advantage of our young solicitors crowded out here who wish to go to the Colonies to practise there."

A German View of Chartered Companies: Chinese Trade: The Native Factor.—"Among the papers," writes Mr. Witliam Rutherford, "lately read before the *Die Internationale Vereinigung für Vergleichende Rechtswissenschaft und Volkswirtschaftslehre* were papers on *Die älteren englischen Kolonialen Charter-Gesellschaften*, by Dr. Alfred Zimmermann, of Berlin, and on *Die Organisation des Fremdhandels in China*, by Dr. Hermann Schumacher, also of Berlin. Dr. Zimmermann recalled the awakening of interest in the almost forgotten Chartered Companies by Prince Bismarck in 1884, who then turned to the methods followed by England in Borneo for a solution of the problem—how to give, without any financial burden to the Empire, Imperial protection to German undertakings in Africa. The conferring of sovereign rights on new commercial companies by means of charters did not suffice, Dr. Zimmermann showed, to create flourishing colonies. He cited the experience of the Hanseatic towns and of the colonies of Italy, Portugal, and Spain. He also pointed out that although for a long period the colonial policy of England was confined to promoting the success of the undertakings in Asia, Africa, and America of companies and individual adventurers, only a few accomplished their object; their means were insufficient or their proceedings were against the interest of the State. He specially dwelt upon the circumstance that in the English charters the rights of monopoly were only granted for a limited period, and that in every case the greatest care was taken to safeguard the interest of the British citizen against the company. The conclusion that Dr. Zimmermann drew from the history of the English Chartered Companies was that the time had gone by for such colonial societies, Dr. Schumacher's paper on the organisation of the foreign trade of China drew attention to the decline of the influence of the foreign merchant and the growing importance of the native. A principal factor in this change is the Komprador—a personage of peculiar importance in China. In business relations of the foreigners and the Chinese he is interpreter and negotiator. The difficulties of the language and currency lead to this. In many cases he is also a *del credere* agent. Another source of his power is the fact that the Kompradors form one of the important guilds of China, and frequently farm the inland taxes. This, added to the fact that they can carry out the inland transport of goods better than any other individual or society tends to give them the control of the home traffic."

British Companies in France.—The enterprise of English companies in France has been seriously threatened by the recent decision of the Court of Cassation in *In re La Construction Limited*. The status of a company trading in a country other than the country of its domicile depends primarily on the comity of nations, and this comity accords to corporations the same rights as it does to individuals. But the matter does not rest there, because the status of English companies in France, and conversely of French

companies in England, is the subject of an Anglo-French Convention entered into between the two countries in 1872. By the express terms of this convention the high contracting parties "mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorised in conformity with the laws in force in either of the two countries, the power of exercising all their just rights and of appearing before the tribunals, whether for the purpose of bringing an action or for defending the same, throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions." The French Court of Cassation, as Mr. Thomas Barclay points out in his recent work on companies in France, has by its decision in *La Construction Limited* engrafted on this convention the following propositions: "(1) That the nationality of British companies depends on the place of their corporate office and upon their principal establishment; and (2) that a company constituted according to British law is not entitled to exercise its rights in France, if formed to escape the rules of public order, prescribed by French law for the creation and working of companies." The result is to introduce much uncertainty into the status of British companies in France, because it makes the place of the principal establishment matter of appreciation. A British company, for instance, starting with a principal establishment in England may so develop its business in France as to make it doubtful whether its principal establishment is not there—*i.e.*, in France and no longer in England—and so find itself transmuted into a non-British company. The right to limited liability is thus made dependent on a "fluctuating circumstance," and the ordinary shareholder ceases to have any guarantee of safety. Fortunately, as Mr. Barclay points out, judicial decisions in France have not the binding character as precedents which they possess in English law; but those of the Court of Cassation have great authority.

Treatment of Prisoners in the United States.—The experiments of the American reformatory system described in Mr. Ruggles-Brise's recent report make an interesting object lesson. The prison reformers in the United States are in sympathy with the doctrine prevalent at the French Revolution, and expressed in the words, "La société prepare la crime—le coupable n'est que l'instrument qui l'execute": hence the tenderness shown in the States towards "les coupables." A youthful offender, or rather a juvenile adult (the age is fifteen to thirty at the Elmira Reformatory, fifteen to thirty-five at Concord), however serious his crime, is looked upon as more sinned against than sinning: his crime is due to inherited defect, mental or physical; to vicious environment; to his not having had a chance. It follows that the duty of the State towards such a person is not so much to punish as to regenerate him physically and mentally to fit him to take his place among honest citizens; to prevent

him from drifting into the class of habitual criminals. To this end the "inmates" of these reformatories (they are not called prisoners) graduate through certain stages of training: their physique is developed by gymnastic and military exercises, their intellect by courses of instruction ranging from the school of the illiterates to advanced lectures on political, ethical, and economic subjects combined with manual and industrial training in trades and technological studies—engraving, etching, carving, etc. The prisons are vast factories, and machinery of the most expensive and modern kind is everywhere in use. The trade profits at one prison amounted for the year to more than £56,000. Moreover, the prisons are not like our own gloomy structures, but light, airy, and cheerful. After the day's work is over—from about 4.30 to 8.30—relaxation is allowed, the cells are lighted with electric light, and smoking, newspapers, and at times playing on musical instruments may be indulged in; but at the same time great stress is laid on the necessity of a firm and exact discipline, to compel obedience to rules and to fortify the self-control of a delinquent. The basis of the whole scheme is the system of "indeterminate" sentences, by which "parole" can be earned in from twelve to twenty-two months.

The Multiplication of Law Reports.—The multiplication of law reports is an evil daily becoming more burthensome to the harassed practitioner. In the United States the evil is even more accentuated than it is here, the output of reports being stated to be some five hundred volumes annually. Lord Campbell's remedy was the heroic one of a decennial *auto-da-fé*; but pending its adoption Massachussets has been trying a system by which the judges themselves are made the arbiters of what cases are to be reported and what are not. According to this method, the judges indorse on the papers, when they disapprove of the publication of a report, the words, "Not to be officially reported." This only means what it says, that the case is not to be reported officially—that is, in the State-paid reports. It does not prohibit the publication of an unauthorised report, or its being cited in court; and no one will be surprised therefore to hear that this judicial censorship has made no appreciable difference in the volume of reported cases. The true remedy for a multiplication of law reports is not to be found in prohibition or autocratic censorship, but in simplifying access to them by well-arranged digests. Lawyers have long reconciled their minds to not mastering the whole domain of law or reading every reported case. A Coke or a Hale might in his day do so: *nos pejor ætas tulit*; and we must content ourselves with that "tumultuary reading of abridgments" which Lord Coke so much deprecated.

Law and Science: Mr. Justice Holmes.—"All admirers of Mr. Justice Holmes' *Common Law*—in other words, all who have read the book—will welcome with delight," says Sir C. Ilbert, "the paper which he read last

January before the New York State Bar Association on *Law in Science and Science in Law*. It exhibits the same sureness and subtlety of touch, the same felicity of expression and illustration, with which we are familiar in his earlier writings. His present object is to show by examples something of the interest of science as applied to law. In his illustrations of historical development he touches on the links which connect the *salmannus*, or salesman, of Salic law with the feoffee to uses and executor of English law. He hints at possible corrections and modifications of the theory which at present holds the field, that the beginning of contract is to be found in an interrupted sale. He gives illustrations of inflated and unreal explanations, which vanish at the touch of history. And at the same time he warns us, as he has warned us before, that even where the historical explanation of a legal rule is sound, it is not the last word, and that 'continuity with the past is only a necessity, not a duty.' He remarks on the rapidity with which an apt and suggestive phrase passes into a maxim or catchword, which is a mere refuge of intellectual indolence. Great is the power of fashion in the domain of law. 'I am immensely struck,' he says, 'with the blind imitativeness of man when I see how a doctrine, a discrimination, even a phrase will run in a year or two over the whole English-speaking people. Lately have we not all been bored to death with *Volenti non fit injuria*, and with Lord Justice Bowen's remark that it is *volenti* and not *scienti*?' 'Do we not hear constantly of "invitation" and "trap," which came into vogue within the memory of many, if not most, of those who are here?' Mr. Justice Holmes makes striking and suggestive comments on the judgment in *Allen* v. *Flood*. He discusses again the question whether and how far standards of conduct such as are implied in the words 'negligence' and 'reasonableness' can be, or should be, formulated as rules of law or left to the jury as questions of fact. And, whilst admitting the convenience of keeping the administration of the law in accord with the wishes and feelings of the community, he maliciously suggests that the justification of the practice of leaving questions of negligence to the jury may be not unlike that which an eminent English barrister gave him—Mr. Justice Holmes—for the distinction between barristers and solicitors. 'It was in substance that if law was to be practised somebody had to be damned, and he preferred that it should be somebody else.'"

The Jury System.—Not long ago it looked, judging by the cause lists, as if the mode of trial by jury were waning in popularity with litigants; but it seems only the ebb and flow of legal practice. It is significant at all events how many authorities have of late spoken on the value of the institution, each eulogist selecting, curiously, a different point for commendation. In America it is the democratic quality of the jury system which recommends it: it is a microcosm of democracy. To that freedom-loving people it seems necessary, as one of their own jurists has said, to introduce

the people into every department of government, so far as the people are capable of exercising it, since only so can an honest administration of governmental powers be ensured. The point which Lord Halsbury selected to emphasise at the recent dinner of the Hardwicke Society was the educational value of the jury system. Under it each citizen may be called upon in every county in England to see and take part in the administration of justice under the procedure of one of Her Majesty's judges. Thus the spirit of fair play is learnt—the habit of suspending judgment in matters of controversy; and the maxim *audi alteram partem* comes home to our "business and bosoms." What Lord Russell, C.J., dwelt on recently was the value of a jury as a tribunal for getting at truth; and he did not hesitate to affirm his belief that the average opinion of twelve men of common sense is at least equal to the judgment of twelve judges on matters of fact. Whether this is due to their minds being less sophisticated by legal technicalities, or to their administering an "equity" or natural justice of their own, or because they are more in touch socially and intellectually with the common run of litigants,—whatever the explanation, it is high praise. Lord Esher's unwillingness to tamper with verdicts is well known. Meanwhile the Calcutta *Weekly Notes* is complaining of the number of verdicts set aside in India. Eighteen out of twenty-seven set aside in 1897, besides four modified, seem a startling record.

Compensation for Unjust Conviction.—Of late there has been a discussion in the newspapers as to the payment of indemnity or compensation to persons unjustly convicted. Whether or not such cases are rare is an open question; but English criminal law is one of the few legal systems of Europe which do not provide for such a contingency. Dr. Andries, an *avocat* of Rotterdam, has published a small volume entitled *Schadeloosstelling aan Onschuldig Veroordeelden*, in which he describes the literature of the subject, mentions the chief historical cases of *erreurs judiciaires*, and prints the text of the chief modern laws relating to the subject. The Scandinavian countries appear to have dealt explicitly with it. In Sweden the accused, in the event of acquittal or of the prosecution being dropped, is entitled to an indemnity for the loss which he has sustained from his imprisonment. The Danish law has similar provisions. According to a communication by Mr. Frantz Melhuis, advocate, Christiania, with respect to the Norwegian law, every sentence which cannot be revised by ordinary regular means may, in certain special conditions, be "resumed" and tried anew. A "resumption" may take place when (1) false or falsified documents have been made use of, or false statements given by witnesses or experts, or when any judge or member of the jury or secretary of the court has been guilty of punishable conduct with regard to the case, and there is no reason to think that this misconduct has brought about or contributed to the verdict of guilty and sentence, or to the application of too severe a punishment;

(2) when new facts turn up, or new proofs are procured, which either by themselves or in connection with the evidence previously given seem likely to bring about the acquittal of the person convicted, or at any rate the application of a less severe punishment. If a "resumption" takes place, and the accused is acquitted, the Treasury indemnifies the accused. The texts cited will be of interest to those who maintain that a proper supplement to a system of appeal in criminal trials is a provision for indemnity to the accused in the case of the new trial resulting in an acquittal.

Native Law in the Straits Settlements.—Mr. Walter Napier's *Introduction to the Study of the Law as Administered in the Colony of the Straits Settlements* illustrates in a very interesting manner the difficulties which arise in the application of a system of English law to persons of various nationalities having various customs as to marriage, adoption, and the like. In the Straits Settlements, for instance, we have a medley of Chinese, Hindoo, Mohammedan, and Parsee elements. The state of society in the early days of the Settlement seems to have resembled, in fact, that which existed in Europe after the destruction of the Roman Empire as described by Savigny: "Franks, Burgundians, and Goths lived on the same soil, each according to their own law: so that Bishop Agobardus could write to Louis le Debonnaire: "It often happens that five men, each under a different law, may be found walking or sitting together." At the present moment the law of this colony consists of so much of the law of England as was in existence when it was imported there, and is of general (and not merely local) policy, and adapted to the conditions and wants of the inhabitants, subject, in its application to the various alien races established there, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them: in other words, native customs are recognised, unless they are contrary to justice and general public policy. Thus, where a Chinaman dies intestate, two widows are entitled to the share which is allotted by English law to the widow of a deceased person. On the other hand, the pledging of a child as a security for a debt is invalid, as being against public policy, although valid in the country where made. Again, a Mohammedan may dispose by will of all his property, although such disposition would be contrary to Mohammedan law. In questions like these, where native custom and English public policy come in contact, there is evidently endless scope for casuistry. Such questions must be solved by the good sense of judges in the light of natural equity. There is no reason for regretting that they have not as yet been brought under what Sir Robert Phillimore called the "Procrustean treatment of positive legislation."

Gambling: a "Place" in Fiji.—The Kempton Park case has evidently had its lessons for other parts of the Empire, and among them Fiji. The recent gambling ordinance passed there takes care to define "place" as

including "any house, office, room, or building, and any place or spot, whether open or enclosed, and any ship, boat, or other vessel, whether afloat or not, and any vehicle." Games of billiards or bagatelle are not an offence; nor is a game in any duly licensed hotel, provided the playing of such game be not in the nature of promiscuous gambling; nor a game which is also an athletic exercise.

Municipal Uniformity in the United States.—"A recent number of the *Annals of the American Academy of Political and Social Science*," writes Mr. Albert Gray, "contains a note on the progress of American endeavour in the direction of good city government. The municipal institutions of the United States have, as is well known, diverged greatly from the English model; the city charters are of endless variety and subject to frequent change, one city quickly following another in experiments before they are justified by experience. Nothing like the uniformity of English municipal law can be found even in one state of the Union. There is a general feeling now that enough has been done in the way of experiment, and that the time has come for some measure of uniformity. At the Fifth National Conference for good city Government held at Louisville in 1897 a committee of ten was appointed to formulate a 'program which will embody the essential principles that must underlie successful municipal government, and which shall also set forth a working plan or system consistent with American industrial and political conditions for putting such principles into practical operation.' This committee has now agreed upon a charter and constitutional amendment which, in the opinion of the committee, 'crystallises the best experience of American and European municipal administration.' The essential features of the charter are as follows: (1) A single-chambered council elected on a general ticket for six years, one-third retiring from office every two years; (2) a mayor elected for two years, with power to appoint and remove heads of departments, with the exception of City Controller; (3) a City Controller elected by the council.

"Provision is made for a well-organised civil service and a system of auditing municipal accounts by some fiscal officer of the State, corresponding, no doubt, to our Local Government Board audit.

"The committee are in favour of large powers of home rule for the municipalities, such as is practically attained in this country by private or rather local Acts passed at the instance of the individual boroughs. They propose therefore that in the legislatures general laws passed for all the cities of a state may be passed by simple majorities, but that special laws for one or more cities should require a two-thirds majority of all the members of the legislature. But this is followed by what will seem to Englishmen a curious condition; namely, that such special Act does not become law unless it is approved by the city within sixty days, or, if not so approved, unless it is again passed by the legislature with a two-thirds majority, which must

include a three-fourths majority of members from outside the city or cities affected.

"It appears from this skeleton form of constitution that the committee do not recommend a departure from the system which has grown up in America during the last fifty years, wherein the mayor, like the governor of a state, is not a working member—as in England—of the council over which he nominally presides, but is the autocratic executive head of the administrative departments of the city. The report is a remarkable exemplification of the American tendency to autocracy in administration and of the national distrust of boards, councils, and committees in relation to city appointments. In the same State, the judges of the Supreme Court may be elected by popular vote, while the head of the city fire brigade must be appointed by the mayor."

The United States and the Acquisition of Foreign Territory.—There is already a considerable literature relating to the right under the constitution of the United States to acquire, hold, and govern foreign territory. Mr. Gardiner, of the New York Bar, has published a pamphlet in which he discusses these questions. He has no doubt as to the right to acquire territory by treaty, purchase, or conquest; it is "a primary or substantive attribute of sovereignty." One important conclusion is stated; the inhabitants of ceded territory possessing no rights as citizens, except such as are specifically granted to them, will have no right to immigrate to the States. "Malays, constituting a considerable proportion of the Filipinos, being neither black nor yellow, but brown, the fifth subdivision of the human race, can be excluded as absolutely as the Chinese." In a recent number of the *Harvard Law Review*, Professor Thayer discusses the same subject. His opinion as to the chief constitutional questions involved appears from the following passage: "The Spanish possessions are held now, and will continue to be held, as we held the southern States, after the Revolution, under military government. Such a government may continue as long as the political department finds it desirable. . . . As regards permanent arrangement we may, if we please, set up a native government, with or without a protectorate, or we may establish some other status of partial allegiance analogous to that of our tribal Indians, or we may govern them precisely as we have governed our territories heretofore." Professor Thayer points out that the territories of the United States are, and always have been, really governed as colonies; and he quotes with approval the remark of Professor Hart, that for more than half a century the United States have been "a great colonial power without suspecting it." Professor Langdell and Mr. Randolph have also lately written on the subject of the legal aspects of annexation. The latter does not agree with Mr. Gardiner as to one important point. Mr. Randolph holds that "these Americans (*i.e.*, people in any foreign territory which may be annexed) possess the same personal and property rights that people of

the States enjoy. . . . All islanders born after annexation, and within the allegiance of the United States, would be citizens." Referring to the case of *Wong Kim Ark* (169 U.S. 649), and the exceptional position of Indians in the United States, Mr. Randolph adds, "We could apply our Indian policy in the Philippines only to persons who have not been in fact within the jurisdiction of Spain, but have been governed by their tribal organisations."

Printed by Hazell, Watson & Viney, Ld, London and Aylesbury.